93-927

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT, Petitioner,

v.

ROBERT PATRICK GUIMONT, ET AL. Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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156 PP

QUESTION PRESENTED

1. May a court use undue oppression as an independent basis to invalidate economic legislation under a facial substantive due process challenge, when the legislation substantially advances the solution to a statewide problem in which the state has a legitimate interest?

LIST OF PARTIES

Appellant before the Washington Supreme Court and Petitioner before this Court is the Director of the Department of Community Development, an agency of the State of Washington.

Respondents before the Washington Supreme Court and Respondents before this Court are:

ROBERT PATRICK GUIMONT and WILLIAM PATRICK GUIMONT, dba National Trailer Park; WINIFRED ROOSENDAAL, dba Gables Motel; LARRY KLAAS, dba ISSAQUAH VILLAGE RV & MOBILE HOME PARK; RONALD SIMOSKY, KATHRYN ANDERSON and DARLENE YOUNG, dba Country Manor Mobile Home Park; FRANKLIN W. EVANS and JOANN S. EVANS, dba University Trailer Park; FRANCES SHOOK, dba Blockhouse Mobile Home Park; LES ROWLAND, dba Les Rowland Enterprises; KEITH MALCOM, dba Mill Village Mobile Home Park; CLIFFORD H. SANDS and NORMA N. SANDS, dba Sands Mobile Home Park; LONNEY FORD and MAX FORD, dba Royal Apartments and Mobile Park; ALVIN RICHARDSON and BONNY RICHARDSON, dba Riverside Mobile Park; ADA STRATTON, dba Spacette Mobile Court; WALLACE R. BARNETT, dba Olivia Park Trailer Court; STEPHEN J. KOLCSEY, dba Mobile Home Wonderland; BETTY MAE BERMAN, dba Central Valley Mobile Home

Park; JOHN M. GRAHAM, dba North Bend Mobile Home Park; V.O. MANASCO, dba Manasco's Mobile Home Park; JOSEPH LEE and PENELOPE A. LEE, dba Linden Square; STAN DELONG and T.R. GILLESPIE, dba Camelot Square Mobile Home Park; HILDA E. WOTHE, dba Fall City Mobile Park; KARL GRASSE, dba Evergreen Mobile Home Park; JAMES CARRIERI and MELINDA CARRIERI, dba Brewster Motel; S. ANDERSON, dba Redmond Mobile Manor; ED COYLE, dba Harbor Mobile Estates; RONALD W. MYERS and DARYL W. NOYD, dba Cascadia Mobile Home Park; JOHN MASSMAN and SHIRLEY A. MASSMAN, dba Lone Cedar Mobile Home Park; MARVEL I. OLSEN, dba Laurelwood Park; JEAN E. EARL, dba Town Mobile Park; MICHAEL SPENCER and RUTH SPENCER, dba Red Gate Mobile Home Park; KINNEY H. LEONARD and IRENE R. FRAZIER, dba Bow Lake Trailer Town; LINDA LEE HUNTLEY, dba East Trent Mobile Home Park; WILLIAM STOTTS and LILLIAN STOTTS, dba Bill & Lil's Mobile Home Court; FRED DETERT and NONA DETERT, dba Brookside Mobile Park; REX BIRCHALL, dba Eastgate Mobile Home Park; MICHAEL J. LANG, dba Cedar Lane Park; KATHY BEGGS and VAN THOMAS, dba Alpine Estates Mobile Home Park; THOMAS L. THORNTON and NANCY K.

THORNTON, dba Tyee Valley Mobile Home Park; FRANK K. ROSS, dba Ross Trailer Park; WILLIAM J. CARRUTH and CARL D. HANSON, dba Cedar Park; B. McKISSEN and H. McKISSEN, dba Liberty Village Mobile Home Park; ROBERT L. COLLOP, dba Angle Lake Mobile Home Park; BRUCE W. ROWE, dba Northwest Mobile Estates; PATRICIA SEVERSON, dba Leisure Manor Mobile Home Park; DOROTHY GRANT ELWAY, dba Carriage Club Estates; GLENN E. BROWN and SUSAN T. BROWN, dba Tyee Trailer Court; LESTER J. CHRISTOPH and IRENE J. CHRISTOPH, dba Hi-U Mobile Home Park; MARINA PANNI, dba Shady Glen; HENRY MILLER and RUTH MILLER, dba Loganberry Park, Mobile Home Park, [sic];
WASHINGTON MANUFACTURED HOUSING ASSOCIATION; BEAR CREEK ASSOCIATES

There is no parent and subsidiary list included in this petition under Rule 29.1 because this document is not being filed on behalf of a corporation.

TABLE OF CONTENTS

I. OPINIONS BELOW 1

II. JURISDICTION 2

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

IV. STATEMENT 3

A. The Mobile Home Relocation Assistance Act. 3
B. Proceedings Below 6

V. REASONS FOR GRANTING THE PETITION 9

A. The Washington Supreme Court's Substantive Due Process Test For Economic and Police Power Legislation Conflicts With This Court's Modern Precedents. 11
1. This Court Has Abandoned the Undue Oppression Test in Evaluating Due Process 12
2. The Washington Supreme Court's Substantive Due Process Test Conflicts With Tests In Every Federal Circuit. 13
3. Inconsistency Between State and Federal Courts is Harmful to the Uniform Application of the United States Constitution. 17

B. Confusion in Other States Calls for Clarification of the Substantive Due Process Test Applicable in Land Use Disputes. 19

C. The Present Case Presents the Court With An Opportunity to End Confusion Regarding the Relationship Between Substantive Due Process and Takings Claims in Land Use Cases . 22

VI. CONCLUSION 24

TABLE OF AUTHORITIES

Cases — Page

Agins v. Tiburon,
447 U.S. 255 (1980) 23

Alabama Home Mortgage Co., Inc. v. Harris,
582 So.2d 1080 (Ala. 1991) 20, 22, 24

Allstate Ins. Co. v. A.A. McNamara & Sons, Inc.,
1 F.3d. 133 (2d Cir. 1993) 14

Anderson v. Douglas Cy.,
4 F.3d 574 (8th Cir. 1993) 14

Bakken v. City of Council Bluffs,
470 N.W.2d 34 (Iowa 1991) 24

Bateson v. Geisse,
857 F.2d 1300 (9th Cir. 1987) 18

Brennan v. Stewart,
834 F.2d 1248 (5th Cir. 1988) 14

Burr v. Town of Rangeley,
549 A.2d 733 (Me. 1988) 19

Cannon v. Coweta County,
260 Ga. 56, 389 S.E.2d 329 (1990) 21

Chatham v. Jackson,
613 F.2d 73 (5th Cir. 1980) 14

Cheyenne Airport Bd. v. Rogers,
707 P.2d 717 (Wyo. 1985), *appeal dismissed*, 476 U.S. 1110 (1986) 19

Christensen v. Yolo County Bd. of Sup'rs,
995 F.2d 161 (9th Cir. 1993) 15, 16

City of Council Bluffs v. Cain,
342 N.W.2d 810 (Iowa 1983) 19

City of Indianapolis v. Clint's Wrecker Service, Inc.,
440 N.E.2d 737 (Ind. Ct. App. 1982) 19

City of Sparks v. Best,
96 Nev. 134, 605 P.2d 638 (1980) 19

Condor Corp. v. City of St. Paul,
912 F.2d 215 (8th Cir. 1990) 14

Coniston Corp. v. Village of Hoffman Estates,
844 F.2d 461 (7th Cir. 1988) 23

Corn v. City of Lauderdale Lakes,
997 F.2d 1369 (11th Cir. 1993) 15

Crowley Beverage Co. v. Miller Brewing Co.,
862 F.2d 688, (8th Cir. 1988) 14

Curto v. City of Harper Woods,
954 F.2d 1237 (6th Cir 1992) 14

Departmentt of Transp. v. Weisenfeld,
617 So.2d 1071 (Fla. Dist. Ct. App. 1993), *review granted, sub nom. Weisenfeld (Joseph) v. Department of Trans.*, __ So.2d __ 23

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39 Cal. 3d 256, 703 P.2d 339,
217 Cal. Rptr. 1 (1985) 19

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317 Or 110, 854 P.2d 437 (1993),
cert. granted, 62 U.S.L.W. 3368
(U.S. Nov. 11, 1993) (No. 93-518) 10, 25

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79 N.Y.2d 592, 594 N.E.2d 911,
584 N.Y.S.2d 417 (1992) 20

Duke Power v. Carolina Envtl. Study Group, Inc.,
438 U.S. 59 (1978) 13

Eide v. Sarasota County,
908 F.2d 716 (11th Cir. 1990) 23

Elam v. City of St. Ann,
784 S.W.2d 330 (Mo. Ct. App. 1990) 20, 23

Electro-Tech, Inc. v. H.F. Campbell Co.,
433 Mich. 57, 445 N.W.2d 61 (1989),
cert. denied, 493 U.S. 1021 (1990) 24

*Esposito v. South Carolina Coastal
Counc.*,
939 F.2d 165 (4th Cir. 1991), *cert.
denied*, 112 S. Ct. 3027 (1992) 14

Exxon Corp. v. Governor of Md.,
437 U.S. 117 (1978), *reh'g denied*,
439 U.S. 844 13

Ferguson v. Skrupa,
372 U.S. 726 (1963) 12

Gamble v. Eau Claire County,
5 F.3d 285 (7th Cir. 1993) 14

General Motors v. Romein,
__ U.S. __, 112 S. Ct. 1105,
117 L. Ed. 2d 328 (1992) 13

Gilbert v. City of Cambridge,
932 F.2d 51 (1st Cir. 1991),
cert denied, 112 S. Ct. 192,
(1991), *reh'g denied*, 112
S. Ct. 922 (1992) 14

Goldblatt v. Hempstead,
369 U.S. 590 (1962) 8, 13

Gordon v. State,
585 So.2d 1033 (Fla. Dist. Ct. App.
1991), approved, 608 So.2d 800 (1992),
cert. denied, __ U.S. __, 113 S. Ct.
1647 24

Grant v. County of Seminole, Florida,
817 F.2d 731 (11th Cir. 1987) 15

Greenbriar, Ltd. v. City of Alabaster,
881 F.2d 1570 (11th Cir. 1989),
reh'g denied, 893 F.2d 346 18

Greene v. Town of Blooming Grove,
879 F.2d 1061 (2d Cir. 1989),
cert. denied, __ U.S. __, 112
S. Ct. 639 (1991) 14

Guimont v. Clarke,
121 Wash. 2d 586, 854 P.2d 1 (1993) . . . . . Passim

Hadacheck v. Sebastian,
239 U.S. 394 (1915) 22

Hispanic Taco Vendors of Wash. v. City of Pasco,
994 F.2d 676 (9th Cir. 1993) 15

Hodel v. Virginia Surface Mining and Reclamation Ass'n,
452 U.S. 264 (1981) 17

In re Application for Incorporation as the City of Sherwood,
241 Kan. 396, 736 P.2d 875 (1987) 19

In re Plan for Orderly Withdrawal from New Jersey,
129 N.J. 389, 609 A.2d 1248 (1992),
cert. denied, __ U.S. __,
113 S. Ct. 1066 23

Jacobs, Viconsi, and Jacobs v. City of Lawrence,
927 F.2d 1111, (10th Cir. 1991) 15

Knight v. Tape, Inc.,
935 F.2d 617 (3d Cir. 1991) 14

Kutrom Corp v. City of Center Line,
979 F.2d 1171 (6th Cir. 1992) 14

L.M. Everhart Constr. v. Jefferson County,
2 F.3d 48 (4th Cir. 1993) 14

LaGrange State Bank v. Cook County,
75 Ill.2d 301, 388 N.E.2d 388
26 Ill. Dec. 673 (1979) 20

Lawton v. Steele,
152 U.S. 133 (1894) 8, 11

Levald v. City of Palm Desert,
998 F.2d 680 (9th Cir. 1993) 15, 16

Lucas v. South Carolina Coastal Coun.,
112 S. Ct. 2886 (1992) 10

Malmed v. Thornburgh,
621 F.2d 565 (3rd Cir. 1980) 14

Matthews v. Shelby County Comm'n,
615 So.2d 605 (Ala. Civ. App. 1992) 24

McAvoy v. H.B. Sherman Co.,
401 Mich. 419, 258 N.W.2d 414 (1977) 24

Means v. Sidiropolis,
184 W. Va. 514, 401 S.E.2d 447 (1990) 19

Metzger v. Town of Brentwood,
117 N.H. 497, 374 A.2d 954 (1977) 20

Midnight Sessions, LTD. v. City of Philadelphia, 945 F.2d 667 (3d Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1668 (1992) 14

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 16

Mugler v. Kansas,
123 U.S. 623 (1887) 22

National Paint & Coatings Ass'n v. City of Chicago,
803 F. Supp. 135 (N.D. Ill. 1992) 23

Nebbia v. New York,
291 U.S. 502 (1934) 12

Noranda Exploration, Inc. v. Ostrom,
113 Wis. 2d 612, 335 N.W.2d 596 (1983) 23

Oklahoma Ed. Ass'n v. Alcoholic Bev. Laws Enf. Comm'n.,
889 F.2d 929 (10th Cir. 1989) 15

Pearson v. City of Grand Blanc,
961 F.2d 1211 (6th Cir 1992) 14, 21, 23

Pennsylvania Cent. Trans. Co. v. New York,
480 U.S. 104 (1978) 23

Pennsylvania Coal v. Mahon,
260 U.S. 393 (1992) 23

Potomac Sand & Gravel Co. v. Governor of Md.,
266 Md. 358, 293 A.2d 241 (1972)
cert. denied, 409 U.S. 1040 . . . . . 20, 21

Presbytery of Seattle v. King County,
114 Wash. 2d 320, 787 P.2d 907 (1990),
cert. denied, 498 U.S. 911 (1990) 11

Robinson v. Seattle,
119 Wash. 2d 34, 830 P.2d 318 (1992),
cert. denied, 113 S. Ct. 676 11

Rymer v. Douglas County,
764 F.2d 796 (1985) 23

Santini v. Lyons,
448 A.2d 124 (R.I. 1982) 19

Saukstelis v. City of Chicago,
932 F.2d 1171 (7th Cir. 1991) 14

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655 P.2d 1293 (Alaska 1982) 19

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989),
cert. denied, 494 U.S. 1016 (1990) 18

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119 Wash. 2d 1, 829 P.2d 765 (1992),
cert. denied, 113 S. Ct. 676 11

Snyder v. City of Minneapolis,
441 N.W.2d 781 (Minn. 1989),
reh'g denied, (1989) 19

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387 Mass. 258, 439 N.E.2d 741 (1982) 19

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110 N.M. 496, 797 P.2d 285 (N.M. App. 1990) *cert. denied*, 110 N.M. 330,
795 P.2d 1022 (1990) 19

State v. Wigley,
599 So.2d 858 (La. Ct. App. 1992),
aff'd in part rev'd in part,
624 So.2d 425 (La. 1993) 20, 21, 24

Summey Outdoor Advertising, Inc. v. County of Henderson,
96 N.C. App. 533, 386 S.E.2d 439 (1989),
review denied, 326 N.C. 486, 392 S.E.2d 101 (1990) 21

Troy Campus v. City of Troy,
132 Mich. App. 441,
349 N.W.2d 177 (1984) 20

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304 U.S. 144, 154 (1938) 12

Williamson County Regional Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985) 17

Yee v. Escondido,
112 S. Ct. 1522 (1992) 3, 8, 10

Zavala v. City and County of Denver,
759 P.2d 664 (Colo. 1988) 19

Constitutional Provisions

U.S. Const. Amend. 5 . . . . . 6, 10

U.S. Const. Amend. 14 . . . . . 6, 11

U.S. Const. Amend. 14 & 5 . . . . . 6, 10

Statutes & Regulations

28 U.S.C. § 1257(a) (1988) 2

28 U.S.C. § 1441(b) (1988) 18

1989 Wash. Laws, ch. 201 . . . . . 2, 4

1990 Wash. Laws, ch. 171 . . . . . 2, 4, 5

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Manheim, *Tenant Protection and the Takings Clause*, 1989 Wis. L. Rev. at 955 n.179 3

Appendices

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT, Petitioner,

v.

ROBERT PATRICK GUIMONT, ET AL., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

Petitioner, the Director of the Department of Community Development, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington in this case.

I. OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 121 Wash. 2d 586, 854 P.2d 1 (1993), and is reproduced in the Appendix at A. The Order denying Petitioner's timely motion for reconsideration is reproduced at Appendix C. The oral decision and order of the Superior Court for Thurston County, Washington, are unreported. They are reproduced at Appendices D and E.

II. JURISDICTION

The decision of the Washington Supreme Court was entered on June 10, 1993. The order denying Petitioner's motion for reconsideration was entered on September 10, 1993. The jurisdiction of this court to review the judgment and opinion of the Washington Supreme Court is invoked under 28 U.S.C. § 1257(a) (1988).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The fourteenth amendment to the United States Constitution provides in part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Mobile Home Relocation Assistance Act, (the Act), chapter 201, Laws of Washington 1989, and amended in chapter 171, Laws of Washington 1990.[1] The Act is reproduced at Appendices F and G.

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[1] The Mobile Home Relocation Assistance Act was amended again in 1991, chapter 327 Laws of Washington 1991. The *Guimont* court stated that the 1991 amendments did not affect its analysis. *Guimont v. Clarke*, 121 Wash. 2d 586, 591 n.1, 854 P.2d 1 (1993). The 1991 amendments, with the exception of new sections, have no effect because the Washington Supreme Court struck down the entire Act.

IV. STATEMENT

When a mobile home park closes, it creates a substantial financial burden for the park tenants who rent space in the park but own their mobile homes. The Washington Legislature enacted the Mobile Home Relocation Assistance Act to address this problem. In analyzing the Act, the Washington Supreme Court found that the:

> State has a legitimate interest in addressing the statewide problem of relocation expenses associated with mobile home park closings [and that making] funds available to mobile home owners who are forced to relocate substantially advances that interest.

Guimont, 121 Wash. 2d at 609. Despite this conclusion, the court ruled that the Act violated the substantive due process guarantees of the Fourteenth Amendment because it was unduly oppressive.

A. The Mobile Home Relocation Assistance Act.

Mobile homes provide a valuable source of affordable housing, especially for low-income and fixed-income elderly tenants. *Guimont*, 121 Wash. 2d at 590-91.[2] In most parks the tenant rents the "pad" from the park owner but retains ownership of his or her mobile home. It is a misnomer to describe older manufactured homes as "mobile". *Yee v. Escondido*, 112 S. Ct. 1522, 1526 (1992). Most older mobile homes, because of their

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[2] *See also* Manheim, *Tenant Protection and the Takings Clause*, 1989 Wis. L. Rev. at 955 n.179.

age and condition cannot withstand the rigors of relocation. Furthermore, the mobility of older manufactured homes is restricted by the lack of available "pads". Thus unlike most landlord tenant relationships, when a park closes the tenant owns a home which he or she may be unable to move. Consequently, tenants lose both their housing and their investment when forced to relocate. Tenants are at a distinct economic disadvantage when a park owner decides to close a park, irrespective of the reason.

Since 1977 Washington has regulated mobile home parks as a unique landlord tenant relationship. Wash. Rev. Code. 59.20, Mobile Home Landlord Tenant Act. In 1989 the Washington Legislature enacted the Mobile Home Relocation Assistance Act ("the Act"), 1989 Wash. Laws, ch. 201, to deal with the problems created by the financial burdens caused by dislocation of park tenants. The Act was amended in 1990 Wash. Laws, ch. 171. In designing a solution to the problems associated with displacement of mobile home park tenants, the Washington Legislature decided to offer relocation assistance as a means of reducing the hardship on the tenants.

The Mobile Home Relocation Assistance Act imposed a fee on the title transfer for all new and used mobile homes in 1990 Wash. Laws, ch. 171, § 6. Fifty dollars of the fee was

dedicated to providing relocation assistance payments to eligible displaced tenants. 1990 Wash. Laws, ch. 171, § 5.

Under the Act, prior to July 1, 1992, park owners were required to pay relocation assistance to displaced tenants owning mobile homes of $7,500 for double-wide homes and $4,500 for single-wide homes, adjusted annually by a consumer price index. 1990 Wash. Laws, ch. 171 § 2(1). After July 1, 1992, a park owner giving at least 24 months advance notice of closure was required to pay $1,000 for double-wide and $500 for single-wide mobile homes, the relocation fund providing the remainder. 1990 Wash. Laws, ch. 171 § 2(4)(a). In the event less than 24 months notice was given, park owners paid one-third and the fund two-thirds of the relocation assistance. 1990 Wash. Laws, ch. 171, § 2(4)(b). Park owners remained responsible for providing all relocation assistance to low-income tenants in the event there were insufficient monies in the relocation fund. 1990 Wash. Laws, ch. 171 § 2(6).

The Act provided a financial incentive to park owners to provide lengthy notice of closure to affected tenants. Assistance was limited to those persons most devastated by park closure, tenants required to move or abandon their homes. Through the title transfer fee, the burden of relocation assistance was spread over the entire industry, not just onto park owners. The Act provided financial assistance to persons harmed by the inherent

inequities of the mobile home landlord tenant relationship while still allowing park owners to close their parks and make profitable use of their land.

B. Proceedings Below

In 1990 the owners[3] of 48 mobile home parks brought this action against the Director of the Department of Community Development, who is responsible for administering the Act. The park owners alleged that payment of the relocation assistance, as required by the Act, constituted a taking of their property in violation of the Fifth Amendment and that it violated substantive due process guarantees of the Fourteenth Amendment.[4] The action was a facial challenge to the Act. None of the park owners alleged that their property had actually been taken or that the Act had been applied to their property.

The trial court granted the park owners motion for summary judgment. It ruled that the Act violated both the Fourteenth and Fifth Amendments and entered a permanent

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[3] Some of the owners joined the action after it was filed. In addition, Respondents Washington Manufactured Housing Association and Bear Creek Associates were allowed to intervene in the case.

[4] The park owners also alleged that the Act violated certain provisions of the Washington State Constitution.

injunction against enforcement of the Act.[5] The Director Appealed this decision.

On appeal, the Washington Supreme Court reversed the trial court judgment on the takings claim and affirmed the trial court's judgment that the Act violated the federal substantive due process clause.

With regard to the takings claim under the Fifth Amendment, the court ruled that under:

> a facial challenge to a land use regulation, the landowner must show that the mere enactment of the regulation constitutes a taking [and] the park owners have made no attempt to show the regulation of their property's use under the Act denies them all economically viable use of their property.

Guimont, 121 Wash. 2d at 605-06. The court also rejected a claim that the Act constituted a physical invasion of the park owner's property. The court stated that "to prove that the government has effected a physical taking through its regulation, the landowner must show that the regulation "required the landowner to submit to the physical occupation of [his or her]

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[5] The trial court also ruled that the Act violated certain provisions of the Washington Constitution. On appeal the Washington Supreme Court declined to review these rulings because the park owners did not brief the relevant factors necessary in Washington to determine whether an independent analysis of the state constitution is proper. *Guimont*, 121 Wash. 2d at 604. Accordingly, the only issues before the Washington Supreme Court and this Court concern the United States Constitution.

land." *Guimont*, 121 Wash. 2d at 607 (citing *Yee v. Escondido*, *supra*). The court ruled that there was no physical invasion. The court, citing *Yee*, said the "Act on its face does not force park owners to allow others to occupy their land [because] the Act still allows park owners to terminate their tenancies, close their parks and sell their land." *Id.* at 608.

The court affirmed the trial court's ruling that the Act violated substantive due process guarantees of the fourteenth amendment. The court applied the following three-prong test set out in *Lawton v. Steele*, 152 U.S. 133, 137 (1894):

> (1) whether the regulation is aimed at achieving a legitimate public purpose; and (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner.

Guimont, 121 Wash. 2d at 608-09.

The court held the Act satisfied the first prong because it "substantially advanced" a legitimate state interest. *Id.* at 609. The court noted that the answer to the second prong question of whether the means are reasonably necessary to achieve the ends was "debatable". *Id.* at 609-10. Although the court recognized "debatable questions as to reasonableness are not for the courts but for the legislature," *Id.* at 609 n.10, citing *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), the court used the undue oppression analysis to decide this "debatable" question and strike down the Act as unreasonable. Clearly, the court ignored

Goldblatt's admonishment to defer to legislative or debatable questions of reasonableness. *Goldblatt*, 369 U.S. at 595.

Among other reasons, the court held that the Act was unduly oppressive because "[r]equiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem." *Guimont*, 121 Wash. 2d at 611. The court applied a "worst case scenario" to conclude the size of the park owners' potential obligations under the Act would be "staggering". *Id.* at 612.

The court refused to sever the unconstitutional provisions requiring the payment of relocation assistance from the remainder of the law; and, therefore, invalidated the entire Act. Petitioner sought reconsideration on the severability ruling only. The court denied reconsideration.

V. REASONS FOR GRANTING THE PETITION

This is an important case that involves a significant unresolved question. By invalidating the Act, based on undue oppression, the Washington Supreme Court reached back to a substantive due process test that this court has long since abandoned. In this respect, the decision below is in conflict with the precedents of this Court and the federal circuit courts covering the last fifty years.

Although this Court has abandoned the undue oppression test, it has never expressly overruled the old decisions that apply the test or, in the alternative, explained how the concept is to be reconciled with the modern approach which grants substantial deference to the legislature. The confusion regarding undue oppression is not limited to Washington. Other state courts have applied the undue oppression test and these decisions also conflict with this Court's modern approach.

It is important that the Court resolve this issue. Increasingly, state land use decisions are being challenged as violating either the Fifth or Fourteenth Amendments. This court has been moving to clarify its Fifth Amendment jurisprudence in the takings area. *See Lucas v. South Carolina Coastal Coun.*, 112 S. Ct. 2886 (1992); *Yee v. Escondido*, 112 S. Ct. 1522 (1992); *Dolan v. Tigard*, 317 Or. 110, 854 P.2d 437 (1993), *cert. granted*, 62 U.S.L.W. 3368 (U.S. Nov. 11) (1993) (No. 93-518). As the rules governing takings become clear, there will likely be an increase in due process challenges to such regulations. At the same time there appears to be growing

confusion regarding the role of substantive due process in the takings analysis. This case offers the opportunity to clarify the proper test for analyzing substantive due process claims under the Fourteenth Amendment applied to a land use regulation.

A. The Washington Supreme Court's Substantive Due Process Test For Economic and Police Power Legislation Conflicts With This Court's Modern Precedents.

The Washington Supreme Court applied the substantive due process test laid down in *Lawton v. Steele*, 152 U.S. 133 (1894). The use of *Lawton*'s undue oppression test as the sole basis for invalidating economic regulations that have been determined to substantially advance legitimate state interests is in direct conflict with all of the Court's substantive due process decisions since the late 1930's.[6] The concept of undue oppression has long since been abandoned by this court.

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[6] As an illustration of how far Washington has strayed from this Court's federal substantive due process jurisprudence, one can look at a simple statistic. The Washington State Supreme Court has used the vague contours of the Due Process Clause to invalidate economic regulations more times in the past three years than the United States Supreme Court has in the past 55 years. *See Guimont, supra*; *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907 (1990), *cert. denied*, 498 U.S. 911 (1990); *Robinson v. Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992), *cert. denied*, 113 S. Ct. 676, and *Sintra, Inc. v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765 (1992), *cert. denied*, 113 S. Ct. 676.

1. This Court Has Abandoned the Undue Oppression Test in Evaluating Due Process.

Federal substantive due process jurisprudence, while not a model of clarity in many areas, has been settled by this court in the area of state legislation adjusting the benefits and burdens of economic life. The *end of the Lochner*-era commenced in 1934 in *Nebbia v. New York*, 291 U.S. 502 (1934), wherein the Court expressed a willingness to defer to legislative judgment on what was reasonable to promote the public welfare. The Court went further in 1938, abandoning *Lochner*-era judicial activism, stating,

> where the legislative judgment is drawn in question, [the court's role] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support for [the legislation].

United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

Justice Black placed the headstone on the era of *Lochner*ian economic substantive due process, when he wrote "We refuse to sit as a superlegislature to weigh the wisdom of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 732-32 (1963).

More recent decisions by the Court only strengthen the Court's adherence to a deferential standard of review for federal

substantive due process.[7] Under Supreme Court precedent, if a piece of legislation rationally furthers a legitimate state purpose it comports with substantive due process.

Although the court has abandoned the *Lawton* undue oppression standard, it has never expressly overruled the case. Indeed, the Court has occasionally cited *Lawton* with approval. *See Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 843 n.1 (Brennan, J. dissenting). Even in *Goldblatt* the Court cautioned that debatable questions are for the legislature and not the Courts. 369 U.S. at 595. The existence of these two lines of authority has led to confusion in Washington and other states.

2. The Washington Supreme Court's Substantive Due Process Test Conflicts With Tests In Every Federal Circuit.

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[7] Examples include *Duke Power v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978), *reh'g denied*, 439 U.S. 844 (1978). *General Motors v. Romein*, __ U.S. __, 112 S. Ct. 1105 (1992). Justice O'Connor writing,

> [t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process: a legitimate legislative purpose furthered by rational means.

General Motors, 112 S. Ct. at 1112.

All of the lower federal courts employ a deferential standard of reasonableness or rationality in reviewing legislation that balances the burdens and benefits of social and economic life. Washington's insistence on applying *Lawton*'s intrusive test for due process without adopting *Goldblatt*'s clear caveats on overly intrusive inquiries places Washington's courts squarely in conflict with every single circuit in the country.[8]

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[8] The various circuits frame the test somewhat differently. However, every circuit applies a deferential legitimate ends and reasonable means analysis as the standard in cases reviewing both land use and other economic regulations. See *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 192 (1991), *reh'g denied*, 112 S. Ct. 922 (1992); *Allstate Ins. Co. v. A.A. McNamara & Sons, Inc.*, 1 F.3d. 133 (2d Cir. 1993); *Greene v. Town of Blooming Grove*, 879 F.2d 1061 (2d Cir. 1989), *cert. denied*, __ U.S. __, 112 S. Ct. 639 (1991); *Knight v. Tape, Inc.*, 935 F.2d 617 (3d Cir. 1991); *Malmed v. Thornburgh*, 621 F.2d 565 (3rd Cir. 1980); *Midnight Sessions, LTD. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1668 (1992); *Esposito v. South Carolina Coastal Counc.*, 939 F.2d 165 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992); *L.M. Everhart Constr. v. Jefferson County*, 2 F.3d 48 (4th Cir. 1993); *Brennan v. Stewart*, 834 F.2d 1248 (5th Cir. 1988); *Chatham v. Jackson*, 613 F.2d 73 (5th Cir. 1980); *Kutrom Corp v. City of Center Line*, 979 F.2d 1171 (6th Cir. 1992); *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); *Curto v. City of Harper Woods*, 954 F.2d 1237 (6th Cir 1992); *Gamble v. Eau Claire County*, 5 F.3d 285 (7th Cir. 1993); *Saukstelis v. City of Chicago*, 932 F.2d 1171 (7th Cir. 1991); *Anderson v. Douglas County.*, 4 F.3d 574 (8th Cir. 1993); *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990); *Crowley Beverage Co. v. Miller Brewing Co.*, 862 F.2d

(continued...)

The extent of the conflict between the State courts in Washington and the federal circuits is most aptly demonstrated by looking at a recent decision directly on point from the Ninth Circuit. *Levald v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), involved a facial challenge to the City of Palm Desert's rent control and vacancy control ordinance for mobile home parks. After applying the proper deferential standard for reviewing substantive due process challenges to economic regulations,[9] the Ninth Circuit concluded:

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[8](...continued)
688, (8th Cir. 1988); *Hispanic Taco Vendors of Wash. v. City of Pasco*, 994 F.2d 676 (9th Cir. 1993); *Christensen v. Yolo County Bd. of Sup'rs*, 995 F.2d 161 (9th Cir. 1993); *Oklahoma Ed. Ass'n v. Alcoholic Bev. Laws Enf. Comm'n.*, 889 F.2d 929 (10th Cir. 1989); *Jacobs, Viconsi, and Jacobs v. City of Lawrence*, 927 F.2d 1111, (10th Cir. 1991); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993) and *Grant v. County of Seminole, Florida*, 817 F.2d 731 (11th Cir. 1987).

[9] The *Levald* court described the test stating:

> In reviewing economic legislation on substantive due process grounds, we give great deference to the judgment of the legislature. "[O]rdinances survive a substantive due process challenge if they were designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purpose of the ordinances." [Citations omitted.] Unlike in the takings context, there is no requirement that the statute

(continued...)

> while one might believe that the ordinance is an ineffective–and indeed draconian–means by which to effect its goals, "[h]ow well the ordinance serves [its] purpose[s] is a legislative question, one the court will not consider" in the context of a substantive due process challenge. *Id.* Dismissal of the substantive due process claim was proper.

Id. at 690.

Once a court reaches the conclusion that a legitimate purpose is furthered by rational, or at least debatably rational means,[10] a substantive due process claim must be rejected.

The decision below is in conflict with this standard. The Washington Supreme Court held that the state had a legitimate interest in addressing the problem of relocation expenses and that providing relocation assistance would be a reasonable necessary means of achieving the purpose of the Act. *Guimont*, 121 Wash. 2d at 609-10. At this point the court should have sustained the Act.

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[9](...continued)

> *actually* advance its stated purpose; rather the inquiry focuses on whether "the governmental body *could* have had no legitimate reason for its decision."

Levald, 998 F.2d at 690 (italics in original).

[10] See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Christensen v. Yolo County Bd. of Sup'rs*, 995 F.2d 161 (9th Cir. 1993).

Instead, the court began to function as a legislative rather than a judicial body. Rather then deferring to the Legislature, the court decided that: "Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem." *Id.* at 611. Under this standard a court could always second guess the Legislature and arrive at its own preferred solution to societal problems.

The court went on to analyze undue oppression in terms of the "worst case scenario" which has the effect of reversing the burden of proof. *Id.* Essentially, the court ruled that in a facial challenge a law may be struck down as unduly oppressive if there is any conceivable circumstance in which the law might be unconstitutional. This conclusion is incorrect. The entire class of persons regulated is not entitled to a presumption that the law is unfair or oppressive. Such unreasonableness must be proven on a case-by-case basis. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 295-97 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

3. Inconsistency Between State and Federal Courts is Harmful to the Uniform Application of the United States Constitution.

The conflict between the Washington Supreme Court and the Ninth Circuit raises serious concerns about the uniform application of the due process clause. Because a substantive due

process challenge such as that presented in *Guimont* is a federal claim, it can be removed to federal court if initiated in state court. 28 U.S.C. § 1441(b) (1988). In the Ninth Circuit, the ripeness and finality requirements applicable to takings claims brought in federal court are not applicable to substantive due process claims alleging improper land use regulation. *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied sub nom., Doody v. Sinaloa Lake Owner's Ass'n*, 494 U.S. 1016 (1990); *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1987) (both holding that substantive due process claim was ripe despite fact that takings claim was not); *see also Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), *reh'g denied*, 893 F.2d 346.

Accordingly, at least in the Ninth Circuit, a state or local government could successfully remove a case alleging a substantive due process violation to federal court where the Ninth Circuit would apply the rational relationship federal substantive due process test. The Ninth Circuit's substantive due process test does not involve an "undue oppression" analysis based on a "worst case scenario".

Faced with a choice between the Ninth Circuit's rational relationship substantive due process analysis and the Washington court's undue oppression analysis, local governments within Washington State would be foolish not to attempt to remove all

substantive due process land use claims to federal court. This situation disserves the federal courts, the litigants and the interests of federal/state comity.

B. Confusion in Other States Calls for Clarification of the Substantive Due Process Test Applicable in Land Use Disputes.

State courts disagree as to the proper test to apply in analyzing a federal substantive due process challenge to a state or local government's land use regulation. Most state courts apply the deferential two part ends-means test employed by the federal courts.[11] Some state courts, exemplified by the

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[11] *See, e.g., Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1297-98 (Alaska 1982); *Development Co. v. City of Oxnard*, 39 Cal. 3d 256, 703 P.2d 339, 342, 217 Cal. Rptr. 1 (1985); *Zavala v. City and County of Denver*, 759 P.2d 664, 670 (Colo. 1988); *City of Indianapolis v. Clint's Wrecker Service, Inc.*, 440 N.E.2d 737, 742 (Ind. Ct. App. 1982); *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 813 (Iowa 1983); *In re Application for Incorporation as the City of Sherwood*, 241 Kan. 396, 736 P.2d 875, 878-79 (1987); *Burr v. Town of Rangeley*, 549 A.2d 733, 735 (Me. 1988); *Spence v. Gormley*, 387 Mass. 258, 439 N.E.2d 741, 749-50 (1982); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989), *reh'g denied*, (1989); *City of Sparks v. Best*, 96 Nev. 134, 605 P.2d 638, 639-40 (1980); *State ex rel. Angel Fire Home and Land Owners Ass'n, Inc. v. South Cent. Colfax County Special Hosp. Dist.*, 110 N.M. 496, 797 P.2d 285, 295 (N.M. App. 1990) *cert. denied*, 110 N.M. 330, 795 P.2d 1022 (1990); *Santini v. Lyons*, 448 A.2d 124, 127 (R.I. 1982); *Means v. Sidiropolis*, 184 W. Va. 514, 401 S.E.2d 447, 451 (1990); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 727 (Wyo. 1985) *appeal dismissed, sub.*

(continued...)

Washington court in *Guimont*, go beyond the ends-means test. They look not only at the rationality of the legislation, but also at the impact of the legislation on landowners. *See* 1 E. Zeigler, *Rathkopf's The Law of Zoning and Planning*, §§ 3.04[5], [6], [7], 6.04 n.8, pp. 6-14 to 6-15 (4th ed. 1993).

State courts, which look at the impact on the landowner, characterize the test differently. Some frame the inquiry as whether the legislation is "unduly oppressive,"[12] while others view the question as whether the legislation's harm to individuals is outweighed by its benefits to society.[13] Many of these

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[11](...continued)
nom., Rogers v. Cheyenne Airport Bd., 476 U.S. 1110 (1986).

[12] *See, e.g., Guimont*, 121 Wn.2d 586, 608-09, 854 P.2d 1 (1993); *Alabama Home Mortgage Co., Inc. v. Harris*, 582 So.2d 1080, 1084 (Ala. 1991); *Cannon v. Coweta Cy.*, 260 Ga. 56, 389 S.E.2d 329, 330, 332 (1990) (in context of facial challenge); *State v. Wigley*, 599 So.2d 858, 861, 862, 863 (La. Ct. App. 1992) *aff'd in part rev'd in part*, 624 So.2d 425 (La. 1993); *Potomac Sand & Gravel Co. v. Governor of Md.*, 266 Md. 358, 293 A.2d 241, 249 (1972) *cert. denied*, 409 U.S. 1040.

[13] See, e.g., *LaGrange State Bank v. Cook County*, 75 Ill.2d 301, 388 N.E.2d 388, 391, 26 Ill. Dec. 673 (1979); *Troy Campus v. City of Troy*, 132 Mich. App. 441, 349 N.W.2d 177, 182 (1984); *Elam v. City of St. Ann*, 784 S.W.2d 330, 334 (Mo. Ct. App. 1990); *Metzger v. Town of Brentwood*, 117 N.H. 497, 374 A.2d 954, 957 (1977); *Doyle v. Amster*, 79 N.Y.2d 592, 594 N.E.2d 911, 913, 584 N.Y.S.2d 417 (1992); *Summey Outdoor Advertising, Inc. v. County of Henderson*, 96 N.C.
(continued...)

courts, including Washington's, base their analysis in whole or in part on the federal due process clause.[14]

Accordingly, there can be little doubt there is significant disagreement, confusion, and conflict between the states as to the appropriate method of analyzing land use regulation under the substantive component of the federal due process clause.[15]

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[13](...continued)
App. 533, 386 S.E.2d 439, 445 (1989), *review denied*, 326 N.C. 486, 392 S.E.2d 101 (1990).

[14] *See, e.g., Guimont*, 121 Wash. 2d at 604 (federal only); *Alabama Home Mortgage Co., Inc. v. Harris*, 582 So.2d 1080, 1084 (Ala. 1991) (same); *Cannon v. Coweta County*, 260 Ga. 56, 389 S.E.2d 329, 330, 332 (1990) (same); *State v. Wigley*, 599 So.2d 858, 861, 862, 861 (La. Ct. App) (1992) (state and federal) *aff'd in part rev'd in part*, 624 So.2d 425 (La. 1993); *Potomac Sand & Gravel Co. v. Governor of Md*, 266 Md. 358, 293 A.2d 241, 246 (1972) (same), *cert. denied*, 409 U.S. 1040; *Summey Outdoor Advertising, Inc. v. County of Henderson*, 386 S.E.2d 439, 444 (N.C. App. 1989) (same).

[15] Moreover, the federal courts are not immune to such confusion. All the circuits apply a legitimate ends measure means analysis. *See* fn. 10, *supra*. However, there is no consistency in application of this test. In *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir 1992), the court undertook an extensive survey of substantive due process jurisprudence in all of the other circuits. The court found:

> The lack of uniformity among the circuits in dealing with zoning cases of the "arbitrary and capricious substantive due process" category is remarkable.

Id. at 1217. The court stated:

(continued...)

The Washington Supreme Court's decision in *Guimont* provides the perfect case for the Court to resolve this confusion. The *Guimont* decision carries the three-part substantive due process analysis used by many states to its extreme. In *Guimont* the Washington court not only applied an "undue oppression" substantive due process analysis, but did so in the context of a facial challenge based on a "worst case scenario".

C. The Present Case Presents the Court With An Opportunity to End Confusion Regarding the Relationship Between Substantive Due Process and Takings Claims in Land Use Cases

As the concurrence in *Guimont* notes, this Court's precedent has generated confusion regarding whether and when due process analysis is even appropriate in a federal constitutional challenge to a land use regulation. *Guimont*, 121 Wash. 2d at 615-16 (Utter, J., concurring). Some past decisions seem based on due process principles, upholding burdensome regulations without much analysis of the impacts,[16] while others

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[15](...continued)
> We wish it were within our power to harmonize these decision, but the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court.

Id. at 1220 n.45.

[16] *See, e.g., Mugler v. Kansas*, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

proceed under Justice Holmes' "too far" takings analysis,[17] while others seem to encompass both analyses.[18]

These apparently inconsistent analyses have led to confusion in the federal[19] and state[20] courts regarding the

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[17] *See, e.g., Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1992); *Pennsylvania Cent. Trans. Co. v. New York*, 480 U.S. 104 (1978).

[18] *See, e.g., Agins v. Tiburon*, 447 U.S. 255 (1980).

[19] *See, e.g., Eide v. Sarasota County*, 908 F.2d 716, 720 (11th Cir. 1990) (identifying four types of land use claims a plaintiff may allege under the federal constitution: "just compensation, due process takings, arbitrary and capricious due process, and equal protection claims"); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992) (same); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988); *Rymer v. Douglas County*, 764 F.2d 796, 802 (1985); *National Paint & Coatings Ass'n v. City of Chicago*, 803 F. Supp. 135, 146 (N.D. Ill. 1992).

[20] *See, e.g., Guimont*, 121 Wash. 2d at 593-604, 608-10 (attempting to reconcile takings and due process); *Department of Transp. v. Weisenfeld*, 617 So. 2d 1071, 1074-83, (Fla. Dist. Ct. App. 1993) (Harris, J., concurring) (same) *review granted, sub nom. Weisenfeld (Joseph) v. Department of Trans.*, __ So.2d __ ; *Elam v. City of St. Ann*, 784 S.W.2d 330, 337 (Mo. Ct. App. 1990) (because Missouri court's due process analysis involves same balancing as takings analysis, takings claims of questionable viability in Missouri); *In re Plan for Orderly Withdrawal from New Jersey*, 129 N.J. 389, 609 A.2d 1248, 1265 (1992) (holding no taking because statute does not violate due process) *cert. denied sub. nom., Twin City Fire Ins. Co. v. Fortunate*, __ U.S. __, 113 S. Ct. 1066; *Noranda Exploration, Inc. v. Ostrom*, 113 Wis. 2d 612, 335 N.W.2d 596, 604-05

(continued...)

interaction of substantive due process and takings. The inconsistency has led some state and federal courts to develop elaborate analytic structures in an attempt to reconcile the cases.

Washington's "insulation" doctrine is just such an attempt. Under the Washington analysis, a regulation is "insulated" from a takings challenge (but subject to a due process challenge) if it either enhances a public right in property or at least seeks to prevent a public harm. *See Guimont*, 121 Wash. 2d at 616-17, 618 (Utter, J., concurring).

Thus, by creating a framework within which to deal separately with a takings and substantive due process, the

[20](...continued)
with taking); *Gordon v. State*, 585 So.2d 1033 (Fla. Dist. Ct. App. 1991), (question framed as whether "statute constitutes an unconstitutional 'taking' of a property right without due process") approved, 608 So. 2d 800 (1992), *cert. denied sub. nom., Gordon v. Florida*, __ U.S. __, 113 S. Ct. 1647; *Matthews v. Shelby County Comm'n*, 615 So. 2d 605, 608 (Ala. Civ. App. 1992) (same); *McAvoy v. H.B. Sherman Co.*, 401 Mich. 419, 258 N.W.2d 414, 427 (1977) (same); *Bakken v. City of Council Bluffs*, 470 N.W.2d 34, 36 (Iowa 1991) (discussing similarities between due process and takings tests); *Alabama Home Mortgage Co., Inc. v. Harris*, 582 So. 2d 1080, 1084 (Ala. 1991) (same); *State v. Wigley*, 599 So. 2d 858, 861, 862, 863 (La. App. 1992) (same) *aff'd in part rev'd in part*, 624 So. 2d 425 (La 1993); *Electro-Tech, Inc. v. H.F. Campbell Co.*, 433 Mich. 57, 445 N.W.2d 61, 66 (1989) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), for the proposition that a taking claim may be framed as a violation of either the Just Compensation or Due Process clauses), *cert. denied*, 493 U.S. 1021 (1990).

Guimont decision presents the Court a unique opportunity to resolve the confusion that has developed over the years regarding the relationship between takings and substantive due process in land use disputes.[21]

VI. CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,
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[21] The Court's recent acceptance of certiorari in *Dolan v. City of Tigard*, *supra*, a case involving interpretation of the *Nollan* takings test, should set the stage for comprehensive analysis of this issue if *Guimont* is accepted for certiorari.

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

ROBERT PATRICK GUIMONT and WILLIAM PATRICK GUIMONT, dba National Trailer Park, WINIFRED ROOSENDAAL, dba Gables Motel; LARRY KLAAS, dba Issaquah Village RV & Mobile Home Park, RONALD SIMOSKY, KATHRYN ANDERSON and DARLENE YOUNG, dba Country Manor Mobile Home Park; FRANKLIN W. EVANS and JOANN S. EVANS, dba University Trailer Park; FRANCES SHOOK, dba Blockhouse Mobile Home Park; LES ROWLAND, dba Les Rowland Enterprises; KEITH MALCOM, dba Mill Village Mobile Home Park; CLIFFORD H. SANDS and NORMA N. SANDS, dba Sands Mobile Home Park; LONNEY FORD and MAX FORD, dba Royal Apartments and Mobile Park; ALVIN RICHARDSON and BONNY RICHARDSON, dba Riverside Mobile Park; ADA STRATTON, dba Spacette Mobile Court; WALLACE R. BARNETT, dba Olivia Park Trailer Court; STEPHEN J. KOLCSEY, dba Mobile Home Wonderland; BETTY MAE BERMAN, dba Central Valley Mobile Home Park; JOHN M. GRAHAM, dba North Bend Mobile Home Park; V.O. MANASCO, dba Manasco's Mobile Home Park; JOSEPH LEE and PENELOPE A. LEE, dba Linden Square; STAN DELONG and T.R. GILLESPIE, dba Camelot Square Mobile Home Park; HILDA E.	)	No. 57765 En Banc Filed June 10, 1993

WOTHE, dba Fall City Mobile Park; KARL GRASSE, dba Evergreen Mobile Home Park; JAMES CARRIERI and MELINDA CARRIERI, dba Brewster Motel; S. ANDERSON, dba Redmond Mobile Manor; ED COYLE, dba Harbor Mobile Estates; RONALD W. MYERS and DARYL W. NOYD, dba Cascadia Mobile Home Park; JOHN MASSMAN and SHIRLEY A. MASSMAN, dba Lone Cedar Mobile Home Park; MARVEL I. OLSEN, dba Laurelwood Park; JEAN E. EARL, dba Town Mobile Park; MICHAEL SPENCER and RUTH SPENCER, dba Red Gate Mobile Home Park,

Respondents,

v.

CHUCK CLARKE, Director of the Department of Community Development of the State of Washington,

Appellant,

v.

WASHINGTON MANUFACTURED HOUSING ASSOCIATION, a Washington non-profit corporation; and BEAR CREEK ASSOCIATES, a partnership,

INTERVENORS/ RESPONDENTS.

JOHNSON, Justice.

The issue in this case is the constitutionality of the Mobile Home Relocation Assistance Act, RCW 59.21, as amended in 1990. *See* Laws of 1989, ch. 201; Laws of 1990, ch. 171. When a mobile home park is closed, this law requires the park owner to contribute money toward the tenants' relocation costs. The Thurston County Superior Court struck down the law as unconstitutional under a number of different theories. We affirm on the grounds that the law violates the park owners' substantive due process rights.

I. BACKGROUND

Mobile home park residents generally own their own mobile homes, but they lease from the park owner the "pads" upon which the mobile homes rest. Because of their dual capacities as owners and renters, these residents face particularly difficult financial burdens when parks are closed. *See* Note, *Mobilehomes: Present Regulation and Needed Reforms*, 27 Stan. L. Rev. 159, 166-67 (1974-1975). When forced to relocate from a closing park, these residents face the expensive task of moving not only themselves but also their homes to other sites. In fact, relocation costs often represent "a significant fraction of the value of the mobile home itself". *Yee v. Escondido*, __ U.S. __, 118 L. Ed. 2d 153, 162, 112 S. Ct. 1522 (1992); *see also* Baar, *The Right to Sell the "Im"mobile Manufactured Home in Its Rent*

Controlled Space in the "Im"mobile Home Park: Valid Regulation or Unconstitutional Taking?, 24 Urb. Law. 157, 158 (1992); Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 955 n.179 (1989). Typically, the transportation costs amount to several thousand dollars, and the setup costs can be $10,000 for a double-wide home. Baar, 24 Urb. Law. at 170-71. Many of the tenants of these mobile home parks are not in a financial position to afford these relocation costs. *See* Laws of 1991, ch. 327, § 8. As the Legislature has specifically found, "manufactured housing and mobile home parks provide a source of low-cost housing to the low income, elderly, poor and infirmed, without which they could not afford private housing . . . ." RCW 59.22.010(1)(a); *see also* Manheim, 1989 Wis. L. Rev. at 925, 955 n.179.

In response to this problem, the Legislature passed the Mobile Home Relocation Assistance Act (Act) in 1989, and amended the Act in 1990.[1] Laws of 1989, ch. 201; *see* Laws of 1990, ch. 171. The Act generally requires the owner of a mobile home park to pay relocation assistance to the park's tenants if the owner wants to close the park or convert it to

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[1] *The Legislature amended the Act again in 1991. See* Laws of 1991, ch. 327. The 1991 amendments are not at issue in this case, and the parties have not presented any argument as to their effect. Regardless, the amendments do not appear to substantially change the Act and do not affect our analysis in this case.

another use. Laws of 1990, ch. 171, § 2(1). Tenants are entitled to $4,500 for single-wide mobile homes and $7,500 for mobile homes double-wide or larger. Laws of 1990, ch. 171, § 2(1).

For relocations occurring prior to July 1, 1991, the park owners generally were required to pay the full amount of these assistance amounts. Laws of 1990, ch. 171, § 2(2). Beginning with relocations occurring after June 30, 1991, the payment of relocation assistance depends in part on whether the tenant is low income. When a low income tenant is forced to relocate after June 30, 1991, the assistance cost is paid one-third by the park owner and two-thirds by the mobile home relocation fund. Laws of 1990, ch. 171, § 2(3). When a low income tenant is forced to relocate after July 1, 1992, assistance payments depend on the relocation notice that was provided. If the park owner gives 24 months' notice, then the park owner pays $500 for a single-wide mobile home and $1,000 for a double-wide or larger mobile home, and the relocation fund pays the balance. If the park owner gives less than 24 months' notice, then the park owner pays one-third of the assistance cost and the relocation fund pays two-thirds. Laws of 1990, ch. 171, § 2(4).

The park owner becomes responsible for paying up to the full amount of the assistance obligations if "there are insufficient moneys in the [relocation] fund . . . ." Laws of

1990, ch. 171, § 2(6). Tenants who do not qualify as low income are not entitled to receive any assistance from the relocation fund. However, the park owners must still pay these tenants the same amount the owners are required to pay directly to low income tenants. Laws of 1990, ch. 171, § 2(7).

The relocation fund is in the custody of the State Treasurer and is administered by the Department of Community Development. Laws of 1990, ch. 171, § 5(1), (4). The relocation fund may be used only for paying mobile home relocation assistance, although certain surplus funds may be transferred to the mobile home park purchase fund established in RCW 59.22. Laws of 1990, ch. 171, § 5(1), (2). The relocation fund may receive money from three sources. Laws of 1990, ch. 171, § 5(1). First, the Legislature may directly appropriate money for the fund, although there is no evidence the Legislature has yet done so. Second, the Legislature in 1990 enacted a $65 fee on transactions transferring mobile home ownership, $50 of which goes to the relocation fund. Laws of 1990, ch. 171, § 6(1). Third, a park owner who owes assistance to low income tenants pays the assistance to the relocation fund, and the fund then distributes the assistance to the low income tenants.

A group of park owners sued the Director of the Department of Community Development (Department) in

Thurston County Superior Court. They sought a declaratory judgment that the Act was unconstitutional and requested a permanent injunction against enforcement of the Act by the Department. The park owners did not seek monetary damages.

The Superior Court granted summary judgment in favor of the park owners and struck down the Act as unconstitutional. The court ruled the Act violated the park owners' constitutional right prohibiting the taking of property without just compensation and violated the park owners' rights to due process and equal protection. The court permanently enjoined the Department from enforcing the Act.

The Department appealed to the Court of Appeals. The Court of Appeals partially stayed the Superior Court's injunction. The appeal was transferred to this court pursuant to RAP 4.3.

II. ISSUES

At issue in this case is the constitutionality of requiring mobile home park owners to pay a portion of their tenants' relocation costs when the owners convert their parks to some other use. Specifically, does the Act result in private property being taken for public use, requiring the payment of just compensation under the Fifth and Fourteenth Amendments? Also, does the Act deprive the park owners of property without due process of law in violation of the Fourteenth Amendment?

III. ANALYSIS

The analytical framework for resolving these issues was developed in *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911, 112 L. Ed. 2d 238, 111 S. Ct. 284 (1990). A land use regulation may be challenged either as an unconstitutional taking or as a violation of substantive due process. *Presbytery*, 114 Wn.2d at 329. If the regulation is challenged on both grounds, under our *Presbytery* framework, we begin by analyzing the takings issue. The court first asks two threshold questions to determine if a regulation is susceptible to a takings challenge. If the regulation passes this threshold inquiry, the court proceeds to a takings analysis. However, if the regulation survives the takings analysis, the court then determines whether the regulation violates substantive due process. *Presbytery*, 114 Wn.2d at 330; *Robinson v. Seattle*, 119 Wn.2d 34, 50, 830 P.2d 318, *cert. denied*, 121 L. Ed. 2d 598 (1992). Of course, nothing precludes a challenge to a land use regulation solely on either rather than on both constitutional grounds.

We subsequently refined and applied the *Presbytery* analysis in *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 829 P.2d 765, *cert. denied*, 121 L. Ed. 2d 598 (1992), and *Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318, *cert. denied*, 121 L. Ed. 2d 598 (1992). Subsequent to oral argument in this case, however, the

United States Supreme Court issued a takings decision in *Lucas v. South Carolina Coastal Coun.*, ___ U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), and supplemental briefing on Lucas was submitted to this court by the parties. Thus, to resolve the takings claim in this case, we must first summarize the *Presbytery* takings framework and then discuss the impact of *Lucas* on that framework before proceeding to resolve the park owners' takings claim.

A. Takings.

1. *Presbytery* Analysis.

Presbytery sets out two threshold questions to determine if additional takings analysis is necessary. The first question is whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area, or whether the regulation "seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit". *Robinson*, 119 Wn.2d at 49; *Presbytery*, 114 Wn.2d at 329. *See also Sintra*, 119 Wn.2d at 15 ("regulations which enhance public interests, and go beyond preventing harmful activity, may constitute a taking"). The second threshold question is whether the challenged regulation destroys one or more of the fundamental attributes of property ownership--the right to possess, to exclude others, or to dispose

of property. *Presbytery*, 114 Wn.2d at 329-30; *Sintra*, 119 Wn.2d at 14 n.6; *Robinson*, 119 Wn.2d at 49-50.

If the regulation merely protects the public health, safety, and welfare (question 1), and the regulation does not destroy a fundamental attribute of ownership (question 2), then no taking occurs, and the court proceeds with determining whether the regulation violates substantive due process if the regulation is challenged on both takings and due process grounds. *Presbytery*, 114 Wn.2d at 330; *Sintra*, 119 Wn.2d at 12-13; *Robinson*, 119 Wn.2d at 50. However, if the regulation either goes beyond preventing a public harm to producing a public benefit, or infringes upon a fundamental attribute of property ownership, further takings analysis is necessary. *Presbytery*, 114 Wn.2d at 330; *Robinson*, 119 Wn.2d at 50.

Once a court determines a regulation is susceptible to a takings challenge, the court next asks whether the regulation substantially advances legitimate state interests. If it does not, the regulation is a taking. *Presbytery*, 114 Wn.2d at 333; *Robinson*, 119 Wn.2d at 50. If the regulation does substantially advance a legitimate state interest, the court's next analysis depends upon whether the challenge to the regulation is a facial challenge or an "as applied" challenge involving the application of the regulation to specific property. *Presbytery*, 114 Wn.2d at 333; *Robinson*, 119 Wn.2d at 50. Under a facial challenge to

a statute regulating the uses that can be made of property, the landowner must show that the mere enactment of the statute denies the owner of all economically viable use of his or her land. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494-95, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). In an "as applied" challenge, the court must engage in "ad hoc, factual inquiries" into the particular economic impact of the regulation on specific property under that case's unique circumstances. *Keystone Coal*, 480 U.S. at 495 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 62 L. Ed. 2d 332, 100 S. Ct. 383, 390 (1979)). Under this analysis, the court considers: (1) the regulation's economic impact on the property; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action. *Presbytery*, 114 Wn.2d at 335-36; *Robinson*, 119 Wn.2d at 51. If the court determines a taking has occurred, then just compensation is mandated. *Presbytery*, 114 Wn.2d at 337; *Robinson*, 119 Wn.2d at 51.

2. *Lucas v. South Carolina Coastal Council.*

The United States Supreme Court recently decided *Lucas v. South Carolina Coastal Coun.*, ___ U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), which addressed the issue of whether a land use regulation accomplished an unconstitutional taking of property under the Fifth and Fourteenth Amendments.

In *Lucas*, petitioner David Lucas purchased two residential lots on the Isle of Palms in South Carolina, where he intended to build a single-family home on each lot. *Lucas*, 120 L. Ed. 2d at 807. Two years later, South Carolina enacted the Beachfront Management Act, which prohibited the construction of occupiable improvements in certain beachfront areas. *Lucas*, 120 L. Ed. 2d at 808. That act had the direct effect of barring Lucas from erecting any permanent habitable structures on his property. *Lucas*, 120 L. Ed. 2d at 807. *Lucas* brought suit, alleging the act[2] deprived him of all economically viable use of the two parcels of property, thereby effecting a taking without just compensation. *Lucas*, 120 L. Ed. 2d at 808-09.

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[2] The opinion in *Lucas* is somewhat unclear about whether *Lucas* brought a facial or "as applied" challenge to the South Carolina statute. The majority opinion does not explicitly state which type of challenge is at issue, but appears to treat it as a challenge to the face of the statute and applies the rule for a facial takings challenge:

> The cases say, repeatedly and unmistakably, that " '[t]he test to be applied *in considering [a] facial [takings] challenge* is fairly straightforward. A statute regulating the uses that can be made of property *effects a taking if it "denies an owner economically viable use of his land."* '"

(Some italics ours.) *Lucas*, 120 L. Ed. 2d at 813 n.6 (citing *Keystone Coal*, 480 U.S. at 495 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-96, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981))). However, the trial court analyzed the particular effect of the statute as applied to *Lucas*'s specific property, and the Supreme Court of South Carolina explicitly stated that *Lucas* brought an "as applied" challenge. *Lucas v. South Carolina Coastal Coun.*, ___ S.C. ___, 404 S.E.2d 895, 895-96 (1991), *rev'd*, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). See also *Lucas*, 120 L. Ed. 2d at 829 n.4 (Blackmun, J., dissenting) ("Here, of course, *Lucas* has brought an as-applied challenge").

The trial court agreed with *Lucas*. The Supreme Court of South Carolina, however, reversed on the grounds that the legislation advanced a legitimate public interest in preventing erosion to coastal zones caused by new construction. *Lucas*, 120 L. Ed. 2d at 809. The court held when a regulation on the use of property is designed to prevent serious public harm, no compensation is owing regardless of the regulation's effect on the property's value. *Lucas*, 120 L. Ed. 2d at 809. The United States Supreme Court granted certiorari and reversed. *Lucas*, 120 L. Ed. 2d at 823.

In analyzing *Lucas*' takings claim, the Supreme Court identified two discrete categories of regulatory action that are "compensable without case-specific inquiry into the public interest advanced in support of the restraint". *Lucas*, 120 L. Ed. 2d at 812. The first category includes challenges to any regulation that results in a "physical invasion" of the owner's property. *Lucas*, 120 L. Ed. 2d at 812. In this category, a regulation that compels a property owner to suffer a "physical invasion" or "occupation"[3] of his or her property is compensable

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[3] A "physical invasion" or "occupation" may be either temporary or permanent, and may result in either a total or partial invasion. According to Lucas, categorical treatment is required "*at least* with regard to *permanent* invasions". (Italics ours.) *Lucas*, 120 L. Ed. 2d at 812. Likewise, the Supreme Court has also stated that "temporary" takings are subject to categorical treatment where the regulation denies the owner all use of his or

(continued...)

no matter how weighty the public purpose behind it or how minute the intrusion. *Lucas*, 120 L. Ed. 2d at 812. The second category includes any challenge where a landowner proves a regulation "denies all economically beneficial or productive use of land". *Lucas*, 120 L. Ed. 2d at 813. The Court labeled this category a "total taking". *Lucas*, 120 L. Ed. 2d at 822. If a regulation results in either a "physical invasion" or a "total taking", the owner has suffered a taking and is entitled to just compensation under the Fifth Amendment *regardless* of the public interest advanced in support of the restraint, unless the State can meet a rebuttal test. *Lucas*, 120 L. Ed. 2d at 812-13, 815. Under the rebuttal test, once an owner establishes that a regulation has denied all economically viable use of his or her property, the State can avoid paying compensation only by identifying "background principles of nuisance and property law that prohibit the uses [the owner] now intends in the circumstances in which the property is presently found". *Lucas*, 120 L. Ed. 2d at 823. In other words, the State must show the proscribed use interests were not part of the owner's title to begin with. *Lucas*, 120 L. Ed. 2d at 820.

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[3](...continued)
her land. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987). The Court observed: "Temporary" takings that deny a landowner all use of his or her property "are not different in kind from permanent takings, for which the Constitution clearly requires compensation". *First English*, 482 U.S. at 318.

3. Impact of *Lucas* on the *Presbytery* Takings Analysis.

The Supreme Court's holding in *Lucas* requires a reordering of the *Presbytery* threshold analysis to accommodate the two *Lucas* categories of takings that do not require case-specific analysis of either the legitimacy of the State's interest or the purpose of the regulation. These categories are "physical invasions" and "total takings".

In squaring *Presbytery* with the *Lucas* analysis, both "physical invasions" and "total takings", as those terms are used in *Lucas*, are most appropriately analyzed under the second prong of the *Presbytery* threshold inquiry, in which the court examines whether a regulation infringes on a fundamental attribute of ownership. *See Presbytery*, 114 Wn.2d at 329-30. Previously, we have indicated "physical invasions" may implicate these fundamental attributes of ownership and thus fall under the second prong of the *Presbytery* threshold test. *Presbytery*, 114 Wn.2d at 330 n. 14 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-40, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) (holding that law requiring landlords to allow television cable companies to place cables in their buildings constitutes a physical taking regardless of how minor the intrusion)). Like "physical invasions", a total denial of all economically beneficial use of property can also be equated with an infringement of a fundamental right of ownership. *Powers v.*

Skagit Cy., 67 Wn. App. 180, 195-96, 835 P.2d 230 (1992) (Grosse, C.J., concurring). In fact, the United States Supreme Court compared "total takings" with "physical invasions" in explaining why "total takings" should be subject to "categorical" treatment. *Lucas*, 120 L. Ed. 2d at 814. The Court stated: The "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation". *Lucas*, 120 L. Ed. 2d at 814. Thus, both categories of "physical invasions" and "total takings" fall under the second prong of the *Presbytery* threshold analysis as infringing on a fundamental right of ownership.

As a result, when a landowner alleges either a "physical taking" or a "total taking", the owner may demonstrate at the outset during the threshold inquiry that the regulation results in a "physical invasion" of his or her property, or deprives the property of all "economically beneficial or productive use". In addition, in light of *Lucas*, the "total takings" category must necessarily include facial challenges to land use regulations in which landowners allege the regulation adversely affects the economic use of their property. *Lucas* dictates this result because in this facial challenge, just as in a "total takings" challenge, the landowner must prove the statute on its face *deprives him or her of all economically viable use of the property*. *See Keystone Coal*, 480 U.S. at 495. Such a facial

challenge to a land use regulation is in effect a "total takings" challenge. Previously, under *Presbytery*, analysis of the economic impact in a facial challenge was examined *after* the court first performed the threshold test and analyzed the State's interest in the regulation. *See Presbytery*, 114 Wn.2d at 333. However, *Lucas* makes clear that a "total takings" claim, alleging deprivation of all economically viable use, does not require analysis of whether the regulation goes beyond preventing a public harm to conferring a public benefit. *Lucas*, 120 L. Ed. 2d at 819. Likewise, any analysis of the public interest advanced in support of the regulation is irrelevant to a "total takings" claim unless the State can show that the economically viable use denied by the regulation was already barred by existing common law principles of the State's property and nuisance law. *See Lucas*, 120 L. Ed. 2d at 812-13. Therefore, in light of *Lucas*, a plaintiff making a facial challenge to the economic impact of a land use regulation is entitled to categorical treatment if he or she can prove at the outset during the threshold test that the regulation denies all economically beneficial use of the property.

Because the plaintiff must have the opportunity at the outset to prove a "physical invasion" or "total taking", *Lucas* necessitates that we reorder the first two steps of our *Presbytery* threshold test. As noted above, we previously asked under the

threshold test whether a regulation implicated fundamental attributes of ownership *after* analyzing the purpose of the statute in preventing harm or conferring a benefit. According to *Lucas*, challenges implicating fundamental attributes of ownership, such as "total takings" or "physical invasions", are subject to categorical treatment and do not require analysis of the purpose of the regulation or the legitimacy of the State's interest. *See Lucas*, 120 L. Ed. 2d at 812-13. Therefore, based on *Lucas*, we must analyze at the outset of the *Presbytery* test whether fundamental attributes of ownership are impaired through "physical invasions" or "total takings", without engaging in any harm-versus-benefit analysis or examining the legitimacy of the governmental interest.

This requirement of *Lucas* can easily be squared with our *Presbytery* analysis by simply reordering the two questions of our threshold inquiry. Hereafter, the court will begin the threshold inquiry by asking whether the regulation denies the owner a fundamental attribute of ownership. Any analysis of "physical invasions" or "total takings", including all facial challenges to land use regulations, will be analyzed at the outset under the first prong of the threshold test. If the plaintiff proves a "physical invasion" or "total taking" occurred, the plaintiff need not proceed with the remainder of the *Presbytery* analysis. However, if the regulation does not implicate fundamental

attributes of ownership, the court will proceed to the next threshold inquiry, analyzing whether the regulation goes beyond preventing a public harm to producing a public benefit. If the purpose of the regulation is to produce a benefit, the court will then proceed with balancing the legitimacy of the State's interest with the adverse economic impact on the landowner.

This reordering of the *Presbytery* threshold test is also in accord with the United States Supreme Court's recent analysis in *Yee v. Escondido*, ___ U.S. ___, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992). *Yee* acknowledges that physical takings--and by analogy "total takings" under *Lucas*--are subject to different analysis from other regulatory takings:

> Most of our cases interpreting the [takings] Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

(Citations omitted.) *Yee*, 118 L. Ed. 2d at 162. Thus, under *Lucas*, our takings analysis of land use regulations is revised to reflect the two categorical takings, "physical invasions" and "total takings", as follows.

Under the *Presbytery* threshold inquiry, as revised above, the court must first ask whether the regulation destroys or derogates any fundamental attribute of property ownership: including the right to possess; to exclude others; or to dispose of property. *See Presbytery*, 114 Wn.2d at 329-30; *Sintra*, 119 Wn.2d at 14 n.6; *Robinson*, 119 Wn.2d at 49-50. In light of *Lucas*, another "fundamental attribute of property" appears to be the right to make some economically viable use of the property. *See Lucas*, 120 L. Ed. 2d at 813-15. If the landowner alleges a "physical invasion" or "total taking", a fundamental right of ownership may be implicated. Therefore, under *Lucas*, the landowner must have the opportunity to prove at the outset under the first threshold inquiry that the regulation either physically "invades" his or her property or denies all economically viable use of the property. Because facial challenges to the economic impact of land use regulations require the landowner to prove the regulation denies all economically viable use of the owner's property, such facial challenges necessarily fall under this "total takings" category and are analyzed under the first *Presbytery* threshold inquiry.

Under the first threshold analysis, if the landowner proves the regulation results in a "total taking", the State will then have the opportunity to rebut this claim by identifying common law principles of state nuisance and property law that

prohibit the uses the landowner now intends in the circumstances in which the property is presently found.[4] *Lucas*, 120 L. Ed. 2d at 820-23. If the landowner proves a "total taking" or "physical invasion" has occurred, and if the State fails to rebut that claim, the owner is entitled to categorical treatment under *Lucas*. *Lucas*, 120 L. Ed. 2d at 812-13. In other words, the owner is entitled to just compensation without case-specific inquiry into the legitimacy of the public interest supporting the regulation. However, if the owner alleges a "physical invasion" or "total taking" and fails to prove that either has occurred, then there is no per se constitutional taking requiring just compensation.

If the landowner alleges less than a "physical invasion" or "total taking" and if a fundamental attribute of ownership is

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[4] This question is one of state law. *Lucas*, 120 L. Ed. 2d at 822. *Lucas* notes that this inquiry

> will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, *see, e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, *see, e.g., id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, *see, e.g., id.*, §§ 827(e), 828(c), 830.

Lucas, 120 L. Ed. 2d at 822. However, courts must look to their own state's existing nuisance and property law in making this determination.

not otherwise implicated, the court proceeds to the second of the *Presbytery* threshold questions. Under the second inquiry, we ask whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area, or whether the regulation "seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit".[5] *Robinson*, 119 Wn.2d at 49. *See also Sintra*, 119 Wn.2d at 14-15; *Presbytery*, 114 Wn.2d at 329. If the regulation goes beyond preventing real harm to the public which is directly caused by the prohibited use of the property and instead imposes on those regulated the requirement of providing an affirmative public benefit, or if the regulation infringes on a fundamental attribute of ownership,[6]

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[5] Several parties and the concurrence argue this part of the *Presbytery* threshold test is undermined by language in *Lucas* questioning harm versus benefit analysis. *See Lucas*, 120 L. Ed. 2d at 819. Curiously, the concurrence uses this language as support for a broad insulation doctrine, concurrence at 11 n.3, whereas respondents argue the same language should be read as a complete rejection of any insulation doctrine. We decline to address their arguments, however, which go beyond what is necessary to decide the narrow issue of a facial takings challenge posed in this case. Moreover, it would be premature to begin dismantling our takings framework, carefully crafted in *Presbytery*, *Sintra*, and *Robinson*, without more definitive guidance on this issue from the United States Supreme Court. Therefore, we decline to further modify our framework at this time and reserve discussion of additional modifications, if any, until we are presented with a case that squarely addresses the issue.

[6] Not every infringement on a fundamental attribute of property ownership necessarily constitutes a "taking". *Presbytery*, 114 Wn.2d at 333

(continued...)

the court proceeds with its taking analysis. Under that analysis, the court first examines whether the regulation substantially advances a legitimate state interest. If it does not, the regulation is a taking. *Presbytery*, 114 Wn.2d at 333; *Robinson*, 119 Wn.2d at 50. If, however, the regulation does substantially advance a legitimate state interest, the court then performs a balancing test. The court asks whether the state interest in the regulation is outweighed by its adverse economic impact to the landowner. In particular, the court considers: (1) the regulation's economic impact on the property; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action. *Presbytery*, 114 Wn.2d at 335-36; *Robinson*, 119 Wn.2d at 51. If the court determines that a taking has occurred, then just compensation is mandated. *Presbytery*, 114 Wn.2d at 51; *Robinson*, 119 Wn.2d at 51.

4. Application of Takings Analysis.

Turning to this case, the Department contends the trial court erred in granting summary judgment because the Mobile Home Relocation Assistance Act does not result in an unconstitutional taking. The park owners contend the trial

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[6](...continued)
n.21. *See, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-83, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980).

court's ruling was correct because the Act violates both federal and state constitutional provisions prohibiting the State from taking property unless just compensation is paid. *See* U.S. Const. amend. 5 (as applied to the states through the Fourteenth Amendment); Const. art. 1, § 16 (amend. 9). However, the park owners have not briefed the relevant *Gunwall* factors necessary for determining whether an independent analysis of the state constitution is proper. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R. 4th 517 (1986). Accordingly, we will analyze only the federal constitution; we will not address the park owners' arguments that the state constitution provides greater protection. *See, e.g., World Wide Video, Inc. v. Tukwila*, 117 Wn.2d 382, 390, 816 P.2d 18 (1991), *cert. denied*, __ U.S. __, 118 L. Ed. 2d 391, 112 S. Ct. 1672 (1992).

Under our revised *Presbytery* takings analysis, we must first decide whether the regulation destroys any fundamental attribute of ownership, including the right to possess, to exclude others, to dispose of property, or to make *some* economically viable use of property. *See Lucas*, 120 L. Ed. 2d at 813-15; *Sintra*, 119 Wn.2d at 14 n. 6; *Robinson*, 119 Wn.2d at 49-50; *Presbytery*, 114 Wn.2d at 333. In this case, the park owners challenge the Act on its face rather than "as applied" to any particular piece of property. As noted above, facial challenges

to land use regulations are analyzed at the outset under this first inquiry of the *Presbytery* threshold analysis.

Under a facial challenge to a land use regulation, the landowner must show that the *mere enactment* of the regulation constitutes a taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). The test for a facial challenge is a high one, in part because the landowner has not presented any evidence about the particular impact of the regulation on his or her parcel of land. Thus, to succeed in proving that a statute on its face effects a taking by regulating the uses that can be made of property, the landowner must show that the mere enactment of the statute denies the owner of all economically viable use of the property.[7] *Keystone Coal*, 480 U.S. at 495 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-96, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)); *Orion Corp. v. State*, 109 Wn.2d 621, 656, 747 P.2d 1062 (1987) (*Orion II*), *cert. denied*, 486 U.S. 1022 (1988). In facial challenges, landowners need not exhaust administrative remedies. *Presbytery*, 114 Wn.2d at 333. Such exhaustion would be futile if indeed the

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[7] In addition to facial challenges to regulations that restrict the use of property, other types of facial challenges include, for example, those alleging that a regulation deprives an owner of a fundamental attribute of ownership or physically invades his or her land. *See* Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339, 386-92 (1989).

regulation prevented any economically viable use of the land. *See Orion Corp. v. State*, 103 Wn.2d 441, 457-60, 693 P.2d 1369 (1985) (*Orion I*). A facial challenge in which the court determines a regulation denies all economically viable use of property "should prove to be a relatively rare occurrence". *Presbytery*, 114 Wn.2d at 335; *see Lucas*, 120 L. Ed. 2d at 814.

In this case, the park owners' complaint can only be read as mounting a facial rather than an "as applied" challenge to the Act. It does not address the Act's impact on any specific piece of property. *See Robinson*, 119 Wn.2d at 50. Moreover, the Department's civil appeal statement and the park owners' answer to the civil appeal statement confirm this case involves only a facial challenge. Despite making a facial challenge, the park owners have made no attempt to show the regulation of their property's use under the Act denies them all economically viable use of their property. As a result, the park owners' facial challenge fails insofar as the Act is challenged as a regulation affecting their economic use of their property.[8]

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[8] The park owners also raise a facial challenge by alleging the Act does not substantially advance legitimate state interests no matter how it is applied. A regulation that does not substantially advance a legitimate state interest can effect a taking. *Presbytery*, 114 Wn.2d at 333. Such a facial challenge is ripe for review because the allegation does not depend on the extent to which the landowners are deprived of the economic use of their particular property or the

(continued...)

The park owners also contend the Act constitutes a taking by physical "invasion" or occupation. The park owners argue the Act forces them to keep their parks open, imposing the park tenants upon them as unwelcome, permanent occupants on their land. Governmental regulations resulting in physical invasion or occupation of property or regulations authorizing a third party to occupy the property are "takings" regardless of how minor the occupation or how weighty the public interest involved. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). Such "physical invasions" may implicate a fundamental attribute of property ownership under the first prong of our *Presbytery* analysis. As a result, if a landowner proves a regulation compels the owner to suffer a "physical invasion" or occupation of his or her property, the owner is entitled to categorical treatment under *Lucas* and must receive just compensation without any further inquiry into the public interest justifying the regulation. *Lucas*, 120 L. Ed. 2d at 812.

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[8](...continued)
extent to which they are compensated. *Yee*, 118 L. Ed. 2d at 169. However, the park owners' argument is without merit. The State has a legitimate interest in addressing the statewide problem of relocation expenses associated with mobile home park closings. Making funds available to mobile home owners who are forced to relocate substantially advances that interest.

To prove that the government has effected a physical taking through its regulation, the landowner must show that the regulation "*requires* the landowner to submit to the physical occupation of [his or her] land". *Yee v. Escondido*, ___ U.S. ___, 118 L. Ed. 2d 153, 165, 112 S. Ct. 1522 (1992). For example, the government has compelled a physical invasion of property by flooding a landowner's property or by requiring the landowner to allow the physical installation of a cable on the owner's property. *Yee*, 118 L. Ed. 2d at 165 (citing *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557 (1872); *Loretto*, 458 U.S. at 440.

In a case similar to this one involving regulation of mobile homes, the United States Supreme Court held a local rent control ordinance did not amount to a physical taking of park owner's property because it did not require the landowner to submit to the physical occupation of his or her land. *Yee*, 118 L. Ed. 2d at 165. In holding the regulation did not result in a physical taking, the Court stated:

> [The park owners] voluntarily rented their land to mobile homeowners. At least on the face of the regulatory scheme, neither the City nor the State compels [park owners], once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. Put bluntly, no government has required any physical invasion of [the park owners'] property. [The park owners'] tenants were

> invited by [the park owners], not forced upon them by the government.
>
> (Citations omitted.) *Yee*, 118 L. Ed. 2d at 165.

In *Yee*, the park owners could still evict the tenants and change the use of their land. Thus, the Supreme Court held the rent control ordinance in that case was only a regulation of the park owners' *use* of their property, and did not amount to a per se taking because it did not authorize an unwanted physical occupation of the park owners' land. *Yee*, 118 L. Ed. 2d at 168.

Like *Yee*, the park owners' physical takings argument in this case lacks merit. The Act on its face does not force park owners to allow others to occupy their land. Rather, the park owners have voluntarily rented space to the mobile home owners, and the Act itself does not compel the park owners to continue this relationship. Indeed, the Act still allows the park owners to terminate their tenancies, close their parks, and sell their land. Thus, the park owners have failed to show that the Act on its face requires any "physical invasion" of their property.[9] Likewise, for the same reasons, the Act does not

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[9] The park owners also argue that the transfer of money required under the Act itself constitutes a physical taking. We disagree. A similar argument has been twice rejected by the United States Supreme Court. *See Yee*, 118 L. Ed. 2d at 166 (reduction in rent under mobile home residency law may "be said to transfer wealth from the one . . . regulated to another", but "in itself does not convert regulation into physical invasion"); *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989) (fee requirements do not constitute physical takings).

unconstitutionally infringe any other fundamental attribute of property ownership, such as the right to possess, exclude others, or dispose of property.

Accordingly, we hold the trial court erred in ruling the Act results in an unconstitutional taking of property without just compensation.

B. Substantive Due Process.

Even if a regulation is not susceptible to a takings challenge, under our *Presbytery* framework, it is next subject to substantive due process scrutiny for reasonableness. *Presbytery*, 114 Wn.2d at 330. In this case, the Department contends the trial court erred in granting summary judgment on the grounds the Act violated the park owners' due process rights. The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. 14, § 1. To determine whether a regulation violates due process, the court uses the classic 3-prong due process test. *Presbytery*, 114 Wn.2d at 330. We must determine "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether

it is unduly oppressive on the landowner."[10] *Presbytery*, 114 Wn.2d at 330.

In this case, we must first decide whether the Act is aimed at achieving a legitimate public purpose. The purpose of the Act is to aid mobile home owners with relocation expenses when a mobile home park is closed. The State has a legitimate interest in addressing the statewide problem of relocation expenses associated with mobile home park closings. Making

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[10] The Department argues no federal precedent supports this court's use of undue oppression as an independent third prong of substantive due process. This 3-prong substantive due process test was first used by the United States Supreme Court in *Lawton v. Steele*, 152 U.S. 133, 137, 38 L. Ed. 385, 14 S. Ct. 499 (1894). Although the Court in Lawton divided the test into only two parts, undue oppression was part of the analysis. *Lawton*, 152 U.S. at 137 (the means must be "reasonably necessary for the accomplishment of the purpose, and *not unduly oppressive* upon individuals"). (Italics ours.) The Court has continued to apply this 3-part test since *Lawton* and acknowledged the Lawton formulation is still valid in *Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962). *Goldblatt* does caution that the rule must not be applied with strict precision because "debatable questions as to reasonableness are not for the courts but for the legislature . . . .". *Goldblatt*, 369 U.S. at 595 (quoting *Sproles v. Binford*, 286 U.S. 374, 388, 76 L. Ed. 1167, 52 S. Ct. 581 (1932)). Despite this deference to the Legislature, however, courts may still employ substantive due process analysis. *See Moore v. East Cleveland, Ohio*, 431 U.S. 494, 502, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (affirming use of substantive due process to invalidate unreasonable city ordinance); Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J. Urb. & Contemp. L. 3, 23-26 (1983). The "unduly oppressive" analysis merely provides a structure for determining the overall reasonableness of the means used to achieve the regulation's public purpose. *See* Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 Wash. L. Rev. 715, 718, 740 n.157 (1982). Recently, we invalidated a housing ordinance as violating substantive due process because it was unduly oppressive and therefore unreasonable. *Robinson v. Seattle*, 119 Wn.2d 34, 55, 830 P.2d 318, *cert. denied*, 121 L. Ed. 2d 598 (1992). The United States Supreme Court refused to grant certiorari in that case.

funds available to mobile home owners who are forced to relocate substantially advances that interest. Thus the Act passes the test of the first due process question.

Under the second due process question, we must determine whether the means used are reasonably necessary to achieve that purpose. Whether the means employed are reasonably necessary to achieving the Act's purpose is debatable. Certainly, providing mobile home owners with relocation assistance would be a reasonably necessary step in achieving the Act's purpose. The more difficult issue here is whether it is reasonably necessary to require the assistance to be paid by the closing park owner. To assist in determining whether these means used by the Act are reasonably necessary in all regards, we must turn to the third due process question, that of undue oppression.

We determine if a statute is unduly oppressive by examining a number of nonexclusive factors to weigh the fairness of the burden being placed on the property owner:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Presbytery, 114 Wn.2d at 331 (citing Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J. Urb. & Contemp. L. 3, 33 (1983)).

We begin by examining the factors on the public's side. The Act represents the Legislature's recognition that the problems caused by the closure of mobile home parks are serious. We too note the seriousness of these problems. Mobile home parks provide a source of low-cost housing for the elderly and those with low incomes. These people often cannot afford relocation costs. Yet by requiring the closing park owner to pay these costs, which can amount to extremely high sums of money, the State is placing the burden of solving housing problems on the shoulders of a few. In *Robinson v. Seattle*, *supra*, we recently struck down a city ordinance as unduly oppressive where the ordinance required, among other things, relocation assistance to tenants displaced when landowners demolished low income housing on the owners' property. *Robinson*, 119 Wn.2d at 55. We stated:

> The problems of homelessness and a lack of low income housing in Seattle are in part a function of how all Seattle landowners are using their property. . . . This court has already said of the [housing ordinance] that solving the problem of the decrease in affordable rental housing in the city of Seattle is a *burden to be shouldered commonly and not imposed on individual property owners*.

(Italics ours.) *Robinson*, 119 Wn.2d at 55. *See also Sintra*, 119 Wn.2d at 22. Likewise, in this case, the costs of relocating

mobile home owners, like the related and more general problems of maintaining an adequate supply of low income housing, are more properly the burden of society as a whole than of individual property owners. While the closing of a mobile home park is the immediate cause of the need for relocation assistance, it is the general unavailability of low income housing and the low income status of many of the mobile home owners that is the more fundamental reason why the relocation assistance is necessary. An individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest of the population. Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem.

We next turn to the factors reflecting the legislation's effect on property owners. The amount of money a park owner must pay under the Act is substantial. In fact, under a worst case scenario, the size of the park owner's obligation is staggering. If the relocation assistance fund lacks sufficient resources to pay its share of the burden, the Act leaves park owners liable for paying the entire amount of the relocation assistance--up to $7,500 for each tenant in the park. For example, if a mobile home park has 100 pads, the park owner could be responsible for paying $750,000 solely because the

owner wants to exercise his or her right to close the business. Even if the fund has sufficient resources to share the burden, the Act still requires park owners to pay large sums of money, the amount of which will vary depending on how much notice the park owner gives to the tenants. Moreover, the Act does not limit the payment of relocation assistance to those who have a low income. Although tenants who do not meet the Act's definition of "low income" are not entitled to payments from the fund, they are entitled to receive the same payments made directly by the park owners to low income tenants. Thus, park owners must directly pay relocation assistance even to those tenants who are not financially burdened.

We also note the Act's provisions are permanent in nature. There is no indication the park owners could have anticipated the Act's requirements when they opened their parks; certainly the Act itself did not give them any grace period in allowing them to decide whether to continue to use their property as a mobile home park before the Act went into effect. Thus, park owners were given no opportunity to alter their present or planned uses without subjecting themselves to the Act's onerous obligations.

In this regard, we deem it important that the increased costs imposed by the Act attach to the activity of leaving a business rather than of entering or conducting the business. The

Department has cited a number of different cases in which this court has upheld the constitutionality of legislation requiring businesses to pay money to others, yet each of these cases involved costs incident either to entering or conducting the business. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976) (addressing a statute requiring mine operators to pay compensation for black lung disease); *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 P. 1101 (1911) (analyzing a statute requiring employers to pay workers' compensation). Owners of businesses in these earlier cases had the option of avoiding these costs by closing down and using their property for other purposes. The imposition of costs on closing a business cannot be avoided in this manner.

We conclude the Act is unduly oppressive and violates substantive due process. In light of this holding, we need not address the other challenges to the trial court's summary judgment order raised by the Department.

C. Severability.

The remaining issue concerns the Act's severability. The Department argues even if the Act is unconstitutional in part, other portions of the Act are valid and should be severed from the unconstitutional portions. The test for severability is whether

> the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, . . . or, alternatively, whether the elimination of the unconstitutional portion so destroys the act as to render it incapable of accomplishing the legislative purposes.

(Citation omitted.) *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972); *see Seattle v. State*, 103 Wn.2d 663, 677, 694 P.2d 641 (1985).

In this case, the Act does contain a severability clause, which states that a decision invalidating any provision of the Act will not affect the remainder of the Act. Laws of 1989, ch. 201, § 17. "A severability clause is often given great weight in determining the Legislature's intent to make different parts of a statute severable." *Seattle*, 103 Wn.2d at 678. Nevertheless, in this case, the remaining provisions of the statute are unseverable under the *Anderson* test because the elimination of the unconstitutional provisions renders the remainder of the Act "incapable of accomplishing the legislative purposes". *Anderson*, 81 Wn.2d at 236. For example, the Department argues that a portion of the money to be used for relocation assistance is not paid by the closing parkowner, but instead is paid from the collection of fees on the transfer of mobile homes. *See* Laws of 1990, ch. 171, §§ 5(1), 6(1). According to the Department, the transfer fees are valid and may be severed from the unconstitutional portions of the Act. In the 1991 amendments to the Act, however, the Legislature placed a termination date of

July 1, 1992, on the collection of these fees. Laws of 1991, ch. 327, § 13(3); *see* former RCW 59.21.060. Thus, these transfer fees alone cannot provide a sufficient fund to accomplish the legislative purpose of providing payments to assist mobile home tenants with relocating to suitable alternative sites.

Accordingly, we conclude the Department's severability argument is without merit.

IV. CONCLUSION

We hold the trial court erred in ruling the Act results in an unconstitutional taking of property without just compensation. However, the trial court correctly concluded the Act violates the park owners' Fourteenth Amendment substantive due process rights. Thus, we hold the Mobile Home Relocation Assistance Act, codified at RCW 59.21, enacted by Laws of 1989, ch. 201, and as amended by Laws of 1990, ch. 171, is unconstitutional. We affirm the trial court's order granting summary judgment, enjoining enforcement of the Act, and awarding the plaintiffs judgment against the defendant for their costs herein.

JOHNSON, J.J. We concur: ANDERSEN, C.J., and BRACHTENBACH, DOLLIVER, DURHAM, SMITH and GUY, JJ.

UTTER, J. (concurring)--While I concur in the majority's conclusion that the Mobile Home Relocation Assistance Act (Act) is unconstitutional as a violation of substantive due process, I write separately to highlight what I view as a troubling development in our takings law. In dicta, the majority has apparently accepted the notion that our recent decisions in Sintra, Inc. v. Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992), cert. denied sub. nom., Robinson v. Seattle, ___ U.S. ___, 121 L. Ed. 2d 598, 113 S. Ct. 676 (1992), and Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992), cert. denied, ___ U.S. ___, 121 L. Ed. 2d 598, 113 S. Ct. 676 (1992), effected a significant transformation of the takings analysis which we so carefully and painstakingly constructed in Orion Corp. v. State, 109 Wn.2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988), and Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 787 P.2d 907 (1990), cert. denied, 498 U.S. 911, 112 L. Ed. 2d 238, 111 S. Ct. 284 (1990). I disagree both with the majority's non-binding new formulation and with the theory that Sintra and Robinson worked such a change in our takings law.

I

The language in the majority which I find objectionable is dicta and as such is not binding on this court in subsequent cases. The plaintiffs have brought only a facial takings challenge

against the Act, and the majority has correctly determined that no showing has been made of a complete deprivation of all economically viable use. Under the majority's analysis, this determination disposes of the plaintiffs' takings claims entirely. Consequently, those portions of the majority which otherwise describe our takings analysis are not necessary to the disposition of the case and are thus dicta. Even with this caveat in mind, however, I am still unable to join the majority opinion. For the sake of discussion in future cases an expression of my views may be helpful.

In Orion and Presbytery, this court developed a comprehensive framework for analyzing constitutional challenges to land-use regulations. One of the critical features of that framework was the distinction it drew between challenges dealt with under the Due Process Clause and challenges heard under the Takings Clause. The distinction was necessary because of conflict between two divergent lines of federal authority, one derived from Mugler v. Kansas, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273 (1887), and the other from Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

In Mugler, the United States Supreme Court emphatically rejected the notion that the state must compensate land owners for police power regulations which happen to affect the value of private land.

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.

123 U.S. at 668-669. In Pennsylvania Coal, without discussing Mugler, the United States Supreme Court apparently reversed field, stating cryptically that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. The tension between Mugler and Pennsylvania Coal was evident, and has been identified as the source of decades of confusion in takings law.[1] To date, the United States Supreme Court has not provided any definitive resolution of the conflict, having over-ruled neither Mugler nor Pennsylvania Coal. Compare Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (applying a Mugler-type analysis) with Lucas v. South Carolina Coastal Council, ___ U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) (determining when a land-use regulation went "too far").

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[1] See, e.g., Settle, Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't, 12 U. Puget Sound L. Rev. 339, 345-351 (1989); Stoebuck, San Diego Gas: Problems, Pitfalls and a Better Way, 25 Wash. U. J. Urb. & Contemp. L. 3, 11-14 (1983). See also, Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. Cal. L. Rev. 561, 587-597 (1983-84) (describing fundamental tension between civic duty conceptions of property and those based on individual liberty).

In Orion Corp. v. State, 109 Wn.2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988), and Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 787 P.2d 907 (1990), cert. denied, 498 U.S. 911, 112 L. Ed. 2d 238, 111 S. Ct. 284 (1990), we developed a careful resolution of the Mugler-Pennsylvania Coal problem by recognizing a critical difference between Due Process and Takings challenges to land-use regulations. We held in Orion that generally when a land owner challenges a land-use regulation safeguarding "the public interest in health, the environment, or the fiscal integrity of the community", that is, a valid police power regulation, the land owner is limited to the Due Process remedy of invalidation of the offending regulation. Orion, 109 Wn.2d at 657. The chief exception to this rule was the circumstance where the land-use regulation served the purpose of "enhanc[ing] a publicly owned right in land." Orion, 109 Wn.2d at 651. In other words, land-use regulations based on the police power were to be analyzed under Due Process rather than as takings, unless the State was in fact employing the guise of police power regulation to appropriate land for public use.

In Presbytery, we limited the Orion holding by recognizing that a land-use regulation based on the police power could be subject to takings challenges if the regulation in

question "destroys one or more of the fundamental attributes of ownership--the right to possess, to exclude others and to dispose of property." Presbytery, 114 Wn.2d at 329-330. Together Orion and Presbytery thus described a simple rule for challenges to police power land-use regulations: Such challenges were to be analyzed under the Due Process Clause, unless the regulations were employed to enhance the value of publicly held property, or destroyed a fundamental attribute of property.

By clearly delineating the circumstances under which takings challenges would be permitted, the Orion-Presbytery test defused the basic tension between Mugler and Pennsylvania Coal.[2] It also effectively balanced the competing rights of state agencies and property owners. On the one hand, governmental agencies were no longer required to run the risk of huge liabilities whenever they enacted innovative land-use regulations.

> [I]f local governments in the past had thought that enactment of a land use regulation might result in monetary awards, then very likely no one would have proposed the planned unit development, the cluster zone, or the floating zone and even if those efforts had received the prior blessing of developers, it is highly unlikely that environmental concerns or regulation of

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[2] The chief analytic hurdle faced by the Orion court in originally elucidating its resolution of the Mugler-Pennsylvania Coal tension was the fact that Justice Holmes had employed the term "taking" in describing the effect of a land-use regulation that went "too far". 260 U.S. at 415. To overcome this hurdle, the Orion court recognized, as had previous courts, that the Pennsylvania Coal "too far" test was in fact a metaphor for Due Process analysis. Orion, 109 Wn.2d at 651 (citing Fred F. French Investing Co., Inc. v. New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976)).

coastal and inland waterways would ever have been risked." Presbytery, 114 Wn.2d at 332 (quoting Sallet, Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues, 18 Urb. Law. 635, 636 (1986) (quoting Wright, Exclusionary Land Use Controls and the Taking Issue, 8 Hastings Const. L.Q. 545, 583 (1981))). On the other, land owners were protected from land-use regulations that go "too far" by the guaranty of Due Process. As the majority amply demonstrates today, that guaranty is hardly toothless.

The Orion and Presbytery approach to police power land-use regulations has come to be known, somewhat inaptly, as the "insulation doctrine". It is so-called because most ordinary land-use regulations are "insulated" from takings challenges. The appellation is inapposite, however, because such regulations are not insulated from Due Process examination.

The majority, in dicta, has departed from this portion of the comprehensive structure erected in Orion Corp. v. State, 109 Wn.2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988), and Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 787 P.2d 907 (1990), cert. denied, 498 U.S. 911, 112 L. Ed. 2d 238, 111 S. Ct. 284 (1990). It states that a police power regulation will be subject to a takings challenge if it "'seeks less to prevent a harm than to impose on those regulated the requirement of providing an

affirmative public benefit.'" Majority, at 8 (quoting Robinson v. Seattle, 119 Wn.2d 34, 49, 830 P.2d 318 (1992), cert. denied, ___ U.S. ___, 121 L. Ed. 2d 598, 113 S. Ct. 676 (1992)).

The differences between this formulation and the one originally set out in Orion-Presbytery are substantial. Under the Orion-Presbytery test, a police power regulation is only subject to takings analysis when it enhances the value of publicly held property. Under the majority's version, such a regulation is subject to takings analysis when it requires the provision of a public benefit, even if the only properties benefitted are privately held. The number of police power regulations which actually enhance the value of publicly held land is relatively small. The number of police power regulations which arguably require the provision of a public benefit is potentially enormous. Jettisoning the original form of the Orion-Presbytery test dramatically expands the potential number of takings challenges.

II

The majority's reformulation of the Orion-Presbytery test is troubling for a number of reasons. First, it requires courts to engage in a form of analysis which is logically incoherent and which has been explicitly, and recently, disavowed by the United States Supreme Court. Second, the majority's formulation has the capacity to resurrect all of the difficulties which initially

spurred this court to develop the Orion-Presbytery test in the first place. And third, the cases on which the majority relies were, like this one, cases in which the appropriate formulation of the insulation doctrine was not directly relevant to the decision.

As noted above, the majority exposes a land-use regulation to takings challenge when the regulation "'seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit.'" Majority, at 8, (quoting Robinson, 119 Wn.2d 49). Effectively, this analysis requires courts to determine whether a given regulation is "harm-preventing", or "benefit-producing".

There is no principled manner in which to make this determination. Does a regulation which prohibits the building of a smoke-belching factory, for example, "prevent the harm of pollution" or "provide the benefit of clean air"? Does a regulation which requires coal companies to leave portions of their coal in the earth to support the surface "prevent the harm of subsidence" or "provide the benefit of stable land"? There simply are not principled answers to these questions. Indeed, since it is possible to argue that virtually any land-use regulation provides some public benefit, the result of the majority's formulation may be to obliterate the insulation doctrine altogether.

The logical incoherence of the harm/benefit distinction was recently recognized by the United States Supreme Court in Lucas v. South Carolina Coastal Council, ___ U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).[3] The Court treated the harm/benefit analysis harshly, noting "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." 112 S. Ct. at 2897. Under the facts of Lucas, the Court observed:

> One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.

112 S. Ct. at 2898.

The Orion-Presbytery analysis, by way of sharp contrast, does not rely upon the insupportable distinction between harm-preventing and benefit-producing regulations. Instead, it asks only whether the challenged regulation "enhance[s] a publicly owned right in land." Orion, 109 Wn.2d at 651. A court must inquire whether the regulation in question actually puts the privately held land to public use, rather than whether it

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[3] I recognize that the majority has reserved the question of the impact of Lucas on the insulation doctrine, at least partially in order to avoid "dismantling our takings framework, carefully crafted in Presbytery, Sintra, and Robinson". Majority, at 19 n.5. This aspect of Lucas, however, does not require us to dismantle our takings framework; instead, it indicates that certain mutations of that framework were unwise and therefore supports a return to the original Orion-Presbytery test.

produces benefit which might accrue to public lands as well as private. In other words, does the regulation effectively impose a servitude on the private land and in favor of publicly held land?[4]

Of course, private property can be taken for public use even when there is no overt occupation or appropriation. Thus, this court entertained the possibility that the creation of the Padilla Bay Sanctuary worked a taking on Orion's tideland holdings because any reasonably profitable use of those tidelands may have been pre-empted by the Sanctuary itself. Orion Corp. v. State, 109 Wn.2d 621, 662, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988). If the Sanctuary did in fact prohibit such use, it had

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[4] Some commentators have misunderstood this aspect of the Orion-Presbytery framework. See, e.g., Comment, Taking Issue With Takings: Has the Washington State Supreme Court Gone Too Far?, 66 Wash. L. Rev. 545, 556 (1991). Indeed, a footnote in Presbytery itself appears to conclude that the test requires a harm/benefit analysis. Presbytery, 114 Wn.2d at 329 n.13. This is not a necessary result, however. Commentators have repeatedly recognized that a public use understanding of the Takings Clause does not necessarily devolve into the "morass" of harm/benefit analysis. See, e.g., Rubenfeld, Usings, 102 Yale L. J. 1077, 1111-1130 (1993); Stoebuck, Police Power, Takings, and Due Process, 37 Wash. & Lee L. Rev. 1057, 1083-1089 (1980). Properly put, the question is not whether a given regulation provides a benefit for public lands, which would indeed recreate the harm/benefit problem, but rather whether the regulation provides for public use of the private property. This is why shutting down a smoke emitting factory (which may benefit all nearby land, including public land) is not a taking, Hadacheck v. Sebastian, 239 U.S. 3941, 60 L. Ed. 348, 36 S. Ct. 143 (1915), but creating a navigable servitude into a private pond for public use is, Kaiser Aetna v. United States, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979).

effectively appropriated Orion's land on behalf of the Sanctuary and was thus a taking.[5] Similarly, in United States v. Causby, 328 U.S. 256, 90 L. Ed. 1206, 66 S. Ct. 1062 (1946), the United States Supreme Court found a taking where a farmer lost his livestock business as a result of aircraft flying low over his land to touch down at a nearby airport. The Court found a taking because the aircraft essentially imposed a servitude on the private land in favor of the public airport. "[T]he land is appropriated as directly and completely as if it were used for the runways themselves." 328 U.S. at 262.

The majority's formulation in dicta of the insulation doctrine is also troubling in that it resurrects some of the problems which Orion-Presbytery labored so mightily to avoid. As noted above, one of the principal motivating concerns of Orion-Presbytery was the possibility that uncertainty in takings law could stifle needed development in land-use regulation through the specter of huge liability judgments against local government. See Orion, 109 Wn.2d at 649; Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 332, 787 P.2d 907 (1990), cert. denied, 498 U.S. 911, 112 L. Ed. 2d 238, 111 S. Ct. 284 (1990). By stating a test as amorphous and manipulable as the harm/benefit distinction, the majority re-creates that uncertainty.

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[5] The court remanded to determine whether any such reasonably profitable use existed. Orion, 109 Wn.2d at 662.

Since there is no principled fashion in which a court can determine whether a given regulation is harm-preventing or benefit-producing, there is of course no way for regulators to be able to predict judicial response. Under the majority's formulation, takings law is returning to where it was prior to Orion and Presbytery.

In revising the Orion-Presbytery test, the majority chiefly relies upon this court's recent decisions in Sintra, Inc. v. Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992), cert. denied sub. nom., Robinson v. Seattle, ___ U.S. ____, 121 L. Ed. 2d 598, 113 S. Ct. 676 (1992), and Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992), cert. denied, ___ U.S. ___, 121 L. Ed. 2d 598, 113 S. Ct. 676 (1992). While it is true that the court in both of those cases described the Orion-Presbytery test in the same manner as does the majority here, in neither case was the shift in language necessary to the decision reached. Furthermore, neither decision discussed the possibility that it was working a fundamental change in the Orion-Presbytery test and thus the court did not have an opportunity to discuss the merits or demerits of a revision in the takings law.

In Sintra, supra, and Robinson, supra, the plaintiff landowners brought a 42 U.S.C. § 1983 action against the City

of Seattle,[6] citing violations of Due Process and of the Takings Clause. As a threshold matter, the City defended against the takings claim on Orion-Presbytery insulation doctrine grounds. It argued that the regulation in question, the Housing Preservation Ordinance (HPO), was a valid police power measure enacted to address the serious problem of displacement and homelessness of low-income tenants. Sintra, 119 Wn.2d at 14 (citing Brief of Respondent, at 37). As such, the City believed the HPO was protected from a takings challenge by the insulation doctrine.

In reviewing this claim, the Sintra court transformed the Orion-Presbytery analysis. While it initially cited Presbytery for the proposition that regulations are only subject to takings challenges when they "actually enhance [ ] a publicly owned right in property", Sintra, 119 Wn.2d at 14 (quoting Presbytery, 114 Wn.2d at 329-330), it later replaced the Orion-Presbytery rule with the notion that regulations may be subject to takings challenges when they "enhance public interests." (Emphasis supplied.) Sintra, 119 Wn.2d at 15. As described above, the

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[6] 42 U.S.C. § 1983 provides what amounts to a tort remedy for violations of federal civil rights. In order to prevail on such a claim, a plaintiff must show: (1) a deprivation of a federal constitutional or statutory right; (2) that the deprivation was caused by someone acting "under color of state law". Parratt v. Taylor, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981); see also, Sintra, Inc. v. Seattle, 119 Wn.2d 1, 12, 829 P.2d 765 (1992), cert. denied sub nom., Robinson v. Seattle, ___ U.S. ___, 121 L. Ed. 2d 598, 113 S. Ct. 676 (1992).

difference between "enhancing a publicly owned right in property" and "enhancing a public interest" is tremendous, yet the Sintra court gave no indication that any change, much less a significant one, had occurred.

The Sintra court then expressed its opinion that, under its new test, the HPO was a benefit-producing measure rather than a harm-preventing measure. Sintra, 119 Wn.2d at 15-16.[7] The court, however, did not rest upon this determination. Instead, it noted that since the HPO had already been held to be an invalid tax in San Telmo Associates v. Seattle, 108 Wn.2d 20, 735 P.2d 673 (1987), the HPO was not a valid police power regulation at all. It stated:

> Certainly, a regulatory scheme which is later determined to be a tax surpasses the proper scope of the City's police power. We, therefore, can determine, as a matter of law, that the HPO was not a proper exercise of the City's police power, and Presbytery's threshold requirements have been met here.

(Footnote omitted.) 119 Wn.2d at 16. Thus, since the court determined that the HPO's inherent invalidity met the requirements of the insulation doctrine, it was unnecessary for

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[7] This aspect of the Sintra opinion provides an excellent example of the manipulability of the harm/benefit distinction. There, the court stated that the HPO was "benefit-producing" because the "harm sought to be prevented–people standing on the street corner with nowhere to go–was exceeded." Sintra, 119 Wn.2d at 15-16. It is difficult to see why building new housing does not serve to prevent the harm of "people standing on the street corner."

the court to decide whether to apply the original version of the doctrine or its new version.[8]

The court's decision in Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992), cert. denied, ___ U.S. ___, 121 L. Ed. 2d 598, 113 S. Ct. 676 (1992), was similar. There, a class of landowners sought civil rights damages under 42 U.S.C. § 1983 against the City of Seattle for the City's enforcement of the same HPO at issue in Sintra, Inc. v. Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992), cert. denied sub. nom., Robinson v. Seattle, ___ U.S. ___, 121 L. Ed. 2d 598, 113 S. Ct. 676 (1992). As in Sintra, the gravamen of the civil rights claims were takings without just compensation and violations of substantive due process. 119 Wn.2d at 48.

In Robinson, the court did not even state the Orion-Presbytery test in its original form, nor, like the Sintra court, did it indicate that a change had taken place. Instead, it simply asserted that regulations which "go [ ] beyond mere harm prevention to require a property owner to provide a public benefit". 119 Wn.2d at 50. The Robinson court, like the Sintra

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[8] The court's decision in Sintra is admittedly unclear on this point. The Sintra court apparently believed that the invalidity of the HPO as a tax was synonymous with its character as a benefit-producing police power regulation. Sintra, 119 Wn.2d at 15-16. Since benefit-producing police power regulations are not per se invalid, the most sensible reading of the Sintra decision is that it surmounted the Presbytery threshold simply by noting that the HPO was an invalid exercise of the police power.

court, then expressed the opinion that the HPO surmounted the insulation doctrine because it "required property owners to provide a public benefit". 119 Wn.2d at 52.

Despite these initial observations, the Robinson court did not conclude that there had been a taking. Instead, the court held that the Robinsons had failed to make a sufficient facial takings challenge to the HPO, in that they had not shown that the regulation had "denied all economically viable use of any regulated property." (Emphasis omitted.) Robinson, 119 Wn.2d at 53-54. Since the Robinsons had only made a facial takings challenge to the HPO, and had failed to adequately support that challenge, their claim failed regardless of whether the Orion-Presbytery insulation doctrine or the new version was employed. As was the case with Sintra, the adoption of the new version of the insulation doctrine was not necessary to the decision.[9]

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[9] It might be argued that the elaborate analyses of takings challenges which we have established in our cases actually require a linear analytic progression, rather than the more limited approach suggested by my discussion. Under that view, in order to reach the question of the facial challenge in Robinson, it was necessary for the court to first dispose of the insulation doctrine. It is, however, commonplace for courts to ignore extraneous issues in order to decide cases on dispositive issues, even when the extraneous issues may be analytically prior to the dispositive ones. In determining the holding of a particular case, therefore, we need look only to those dispositive issue.

Our decisions in Sintra and Robinson, like our decision in this case, thus do not represent binding statements of the appropriate scope of the insulation doctrine.

III

The majority's unnecessary and non-binding reformulation of the Orion-Presbytery insulation doctrine represents an alarming trend in our takings law. While the majority's statements are only dicta, this trend should not be allowed to continue and perhaps crystallize into settled law without comment. Since I believe the changes endorsed by the majority are unwise and unsupported by our case law, I concur only in the opinion of the court that the Act violates Substantive Due Process and the judgment of the court that the Act has not worked a taking.

APPENDIX B

[FILED:
Sept. 13, 1993]

THE SUPREME COURT OF WASHINGTON

ROBERT PATRICK GUIMONT and WILLIAM PATRICK GUIMONT, dba National Trailer Park, et al.,	MANDATE
Respondents,	
v.	
CHUCK CLARKE, Director of the Department of Community Development of the State of Washington.	No. 57765-0 Thurston County No. 90-2-000 62-9
Appellant,	
v.	
WASHINGTON MANUFACTURED HOUSING ASSOCIATION, a Washington non-profit corporation; and BEAR CREEK ASSOCIATES, a partnership,	
Intervenors/Respondents.	

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Thurston County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on June 10, 1993, became the decision terminating review of this Court in the above entitled cause on September 10, 1993. This cause is mandate to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $244.18 awarded to Respondents and against the Appellant. Order Denying Motion for Reconsideration was entered herein on September 10, 1993. Copy attached.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 13th day of September, 1993.

/s/ C.J. Merritt
Clerk of the Supreme Court,
State of Washington

(seal)

cc: Mr. John Ryan
Mr. Jerry Spoonemore
Mr. Russell Austin
Mr. Ronald Zumbrun
Mr. John Groen
Mr. Benjamin Gantt
Mr. Hugh Tobin
Reporter of Decisions
Mr. John Blankinship
Ms. Jane Koler
Mr. David Girard
Mr. Edward Connor
Mr. Richard Stephens
Mr. Michael Sinsky
Mr. Martin Muench

APPENDIX C

[FILED:
Sept. 10, 1993]

THE SUPREME COURT OF WASHINGTON

ROBERT PATRICK GUIMONT, et al.,	)	
Respondents,	)	
v.	)	
CHUCK CLARKE,	)	No. 57765-0
Appellant,	)	ORDER DENYING
v.	)	MOTION FOR RECONSIDERATION
WASHINGTON MANUFACTURED HOUSING ASSOCIATION, et al.	)	
Intervenors/Respondents.	)	

The Court having decided that the appellant's motion for reconsideration be denied,

It is hereby ordered that the motion is denied.

DATED this 10 day of September, 1993.

/s/ Charles Z. Smith
Acting Chief Justice

121 Wn.2d 586

APPENDIX D

[FILED:
Sept. 5, 1990]

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

ROBERT PATRICK GUIMONT and WILLIAM PATRICK GUIMONT, dba National Trailer Park, WINIFRED ROOSENDAAL, dba Gables Motel; LARRY KLAAS, dba ISSAQUAH VILLAGE RV & MOBILE HOME PARK, RONALD SIMOSKY, KATHRYN ANDERSON and DARLENE YOUNG, dba Country Manor Mobile Home Park; FRANKLIN W. EVANS and JOANN S. EVANS, dba University Trailer Park; FRANCES SHOOK, dba Blockhouse Mobile Home Park; LES ROWLAND, dba Les Rowland Enterprises; KEITH MALCOM, dba Mill Village Mobile Home Park; CLIFFORD H. SANDS and NORMA N. SANDS, dba Sands Mobile Home Park; LONNEY FORD and MAX FORD, dba Royal Apartments and Mobile Park; ALVIN RICHARDSON and BONNY RICHARDSON, dba Riverside Mobile Park; ADA STRATTON, dba Spacette Mobile Court; WALLACE R. BARNETT, dba Olivia Park Trailer Court; STEPHEN J. KOLCSEY, dba Mobile Home Wonderland; BETTY MAE BERMAN, dba Central Valley Mobile Home Park; JOHN M. GRAHAM, dba North Bend Mobile Home Park; V.O. MANASCO, dba Manasco's Mobile Home Park; JOSEPH LEE and PENELOPE A.	) No. 90-2-00062-9) SUMMARY DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

LEE, dba Linden Square; STAN DELONG)
and T.R. GILLESPIE, dba Camelot)
Square Mobile Home Park; HILDA E.)
WOTHE, dba Fall City Mobile Park;)
KARL GRASSE, dba Evergreen Mobile)
Home Park; JAMES CARRIERI and)
MELINDA CARRIERI, dba Brewster Motel;)
S. ANDERSON, dba Redmond Mobile)
Manor; ED COYLE, dba Harbor Mobile)
Estates; RONALD W. MYERS and DARYL)
W. NOYD, dba Cascadia Mobile Home)
Park; JOHN MASSMAN and SHIRLEY A.)
MASSMAN, dba Lone Cedar Mobile)
Home Park; MARVEL I. OLSEN, dba)
Laurelwood Park; JEAN E. EARL, dba)
Town Mobile Park; MICHAEL SPENCER)
and RUTH SPENCER, dba Red Gate)
Mobile Home Park; KINNEY H. LEONARD)
and IRENE R. FRAZIER, dba Bow Lake)
Trailer Town; LINDA LEE HUNTLEY,)
dba East Trent Mobile Home Park;)
WILLIAM STOTTS and LILLIAN STOTTS,)
dba Bill & Lil's Mobile Home Court;)
FRED DETERT and NONA DETERT,)
dba Brookside Mobile Park; REX)
BIRCHALL, dba Eastgate Mobile Home)
Park; MICHAEL J. LANG, dba Cedar)
Lane Park; KATHY BEGGS and VAN)
THOMAS, dba Alpine Estates Mobile)
Home Park; THOMAS L. THORNTON and)
NANCY K. THORNTON, dba Tyee Valley)
Mobile Home Park; FRANK K. ROSS,)
dba Ross Trailer Park; WILLIAM J.)
CARRUTH and CARL D. HANSON, dba)
Cedar Park; B. McKISSEN and H.)
McKISSEN, dba Liberty Village)
Mobile Home Park; ROBERT L. COLLOP,)
dba Angle Lake Mobile Home Park;)
BRUCE W. ROWE, dba Northwest Mobile)

Estates; PATRICIA SEVERSON, dba Leisure Manor Mobile Home Park; DOROTHY GRANT ELWAY, dba Carriage Club Estates; GLENN E. BROWN and SUSAN T. BROWN, dba Tyee Trailer Court; LESTER J. CHRISTOPH and IRENE J. CHRISTOPH, dba Hi-U Mobile Home Park; MARINA PANNI, dba Shady Glen; HENRY MILLER and RUTH MILLER, dba Loganberry Park, Mobile Home Park, [sic]

Plaintiffs,

vs.

CHUCK CLARKE, Director of the Department of Community Development of the State of Washington,

Defendant.

THIS MATTER came on for hearing on the Plaintiffs' Motion for Summary Judgment and the Court having considered the matters set forth in the court file, including the declarations of William Patrick Guimont and John D. Blankinship in support of said motion, and the affidavit of Ben Bonkowski in opposition, and the Court having further considered the memoranda and briefs of both counsel, the Court thereupon announced its oral decision.

Now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiffs' Motion for Summary Judgment is granted;

2. Chapter 201, Washington Laws of 1989 codified as Chapter 59.21 of the Revised Code of Washington, and Chapter 171, Washington Laws of 1990, commonly known together as the Mobile Home Relocation Assistance Act, are hereby declared to be unconstitutional because they (a) take property (money) from mobile home park owners for the private use of tenants without just compensation in violation of Article I, Section 16 of the Washington State Constitution and in violation of the Fifth Amendment of the Federal Constitution; (b) deprive park owners of property without due process of law in violation of Article I, Section 3 of the Washington State Constitution and in violation of the Fourteenth Amendment of the United States Constitution; (c) levy taxes on park owners for other than public purposes, to wit, for the private advantage of tenants in violation of Article VI, Section 1 of the Washington State Constitution; and (d) grant tenants privileges or immunities at the expense of landlords in violation of Article I, Sections 8 and 12 of the Washington State Constitution and in violation of the Equal Protection Clause of the United States Constitution.

3. The defendant is hereby permanently enjoined from any efforts to enforce the acts referred to in paragraph 2 of this order.

4. The plaintiffs are awarded judgment against the defendant for their costs herein.

DONE IN OPEN COURT September 5, 1990.

/s/ Richard A. Strophy
Judge

Presented by:

MONTGOMERY, PURDUE,
BLANKINSHIP & AUSTIN

By: /s/ John D. Blankinship
John D. Blankinship, P.S.
WA State Bar No. 00411
Attorneys for Plaintiffs

Copy received;

ATTORNEY GENERAL OF WASHINGTON

By /s/ John J. Ryan
Assistant Attorney General

Copy Received; Approved for Entry
9/5/90

/s/ Russell A. Austin, Jr.
Attorney for Intervenors WMHA

/s/ Jane Ryan Koler
Jane Ryan Koler of Casey and
Pruzan for Bear Creek Associates

APPENDIX E

[FILED:
Aug. 6, 1990]

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR THE
COUNTY OF THURSTON

ROBERT PATRICK GUIMONT,	)	
	)	
Plaintiff,	)	No. 90-2-62-9
	)	
vs.	)	
	)	
CHUCK CLARKE,	)	
	)	
Defendant.	)	

ORAL DECISION OF THE COURT

Monday, August 6, 1990

HEARD BEFORE THE HON. RICHARD A. STROPHY, JUDGE

Jeanette Hughes, CSR
Court Reporter

Morning Session

Monday, August 6, 1990
10:32 o'clock a.m.

* * * *

ORAL DECISION OF THE COURT

THE COURT: The matter before the Court is Guimont And Others vs. Chuck Clarke, Director of the Department of Community Development of the State of Washington. This matter comes on on [sic] the motion of the Plaintiff Park Owners for summary judgment declaring the Mobile Home Relocation Assistance Acts of 1989 and 1990 unconstitutional.

The bases for their challenges are that certain provisions of the acts constitute a taking of property of the park owners without just compensation and deprive the owners of property without due process of law and further that provisions of the acts place a levy, a tax on the park owners for a purpose other than a public purpose and the acts violate the protection provisions of the U.S. and state constitutions.

Chapter 201 of the Laws of 1989 was enacted by the Legislature to assist persons who reside in mobile home parks to relocate their homes with less difficulty when the park is closed or converted to some other use. Under Section 2 of the act all park tenants who are forced to move their mobile home by the closure are entitled to a relocation assistance payment from park

owners in the state fund in an amount of $4,500 if they own a single-wide home or $7,500 if they own a double-wide or larger home. That relocation assistance amount changes based upon periodic reference to apparently the Consumer Price Index.

If the affected park is closed before July 1, 1991, the park owners not the state fund are responsible for the entire amount. Between 1 July 1991 and 1 July 1992 the park owner is responsible for one-third of the assistance payment and the state fund is responsible for the other two thirds. After June 30, 1992 if the owner provides 24 months notice of park closure, assistance in the amount of $500 or $1,000, depending on the size of the unit, is all that is required to be paid by the park owner. If less than 24 months notice is provided the assistance provided or required is identical to the amount specified during the period of June 30, 1991 and 1 July 1992.

Chapter 171 of the Laws of 1990 amended certain sections of the 1989 act but retain most of the provisions of the earlier act. According to Plaintiffs, the most significant change in the act is the change concerning who is eligible for assistance. Under the 1990 amendments only low income tenants are eligible for assistance from the state fund after 30 June 1991. However, tenants who do not qualify as low income are eligible for the assistance payment directly from the park owner but only in the amount the park owner would have been required to pay if the

tenant had qualified as a low income tenant. In addition, if the state fund ever runs short or runs dry of money, the park owners are then responsible for the entire amount of the assistance for which the tenant would otherwise be eligible. By affidavit, which is uncontroverted, the fund is made up of funds collected pursuant to the imposition of a levy or an assessment with respect to the transfer of title of every mobile home, that amount being $65 each transfer, $50 of which goes to the state fund. Currently the state fund as of July 1990 has approximately a $65,000 balance.

The State Department of Community Development, which I'll refer to as "the State," first of all, has argued the matter is not appropriate for summary judgment for essentially two reasons--it's not a justiciable controversy and not ripe, and further as a correlary [sic] to that argument the case requires further factual development because the Department has not promulgated any rules or regulations to implement the act.

The Court discounts those arguments given the relatively liberal justiciability test of RCW 7.24. It's my conclusion that the controversy presented by the Complaint for Declaratory Relief describes at a minimum the mature seeds of an actual present and existing dispute and the parties have genuine and opposing interests.

Mobile home park owners are directly involved and

affected by application of this legislation at any time they seek to develop or convert their property to a different use and these interests are direct and substantial, they're not merely theoretical or abstract or academic. And based upon the Deputy Sheriffs' Guild vs. County Commissioners, 92 Wn.2d, [sic] 844 and Lawson vs. State, 107 Wn.2d 444, I conclude that there's a justiciable controversy.

Further, applying the test of First Covenant Church of Seattle, 114 Wn.2d, [sic] 392, I conclude the case is ripe for judicial review. Certainly there's a hardship to the parties by withholding court consideration in that they would have to wait until they attempt to actually sell or convert their property and not have the benefit of an interpretation or declaration as to the validity of the challenged statutes until that point, and I don't think that that would be appropriate. There is a claim fit for judicial decision which is primarily legal and does not require further factual development which is now present before the Court.

With respect to the need to delay, to wait for a Department promulgation of rules, the Department could hardly promulgate rules that are inconsistent with this legislation that would affect its facial validity regarding the assessment of payments from park owners in the manner previously set forth.

The next question is whether or not the assessments

constitute a tax. The Department argues that the challenged provisions constitute economic legislation which has an incidental economic effect, that the legislation is merely regulatory and not a tax. The San Telmo case provides some guidance on whether or not legislation such as this constitutes a tax or something different. I find the San Telmo case on this point close, very close in terms of its circumstances and conclude based upon the rationale of the San Telmo case that the statutes here before the Court are more than economic legislation.

The effect of the statute amounts to a tax and it amounts to a taking, and whether or not the taking is in accord with due process principles or is an uncompensated taking is the next issue that the Court has to address. And in that regard both parties have cited the Presbytery of Seattle case. Under Presbytery the test this legislation must meet is whether or not it is aimed at achieving a legitimate public purpose. And I think it is a close call on whether or not this legislation is achieving and has even as its stated purpose--in fact, it lacks that stated purpose in Chapter 529--a broad enough public purpose.

There are other statutes from which the State argues when put together the Court can glean is public purpose, but 521--excuse me, not 529, I find nowhere a statement of public purpose, but if I can construe implicit in the purpose of this statute the maintenance of low cost housing for the elderly and

low income, I conclude that maybe minimally the legislation is aimed at achieving a legitimate public purpose, that is, maintaining affordable housing. Are there means that reasonably achieve that purpose when compared to other potential means? That's where I have difficulty and also on the third prong of the Presbytery test, whether it is unduly oppressive on the land owner.

For this Court to uphold a statute under this test, I have to conclude that there's a public problem or evil, the legislation must tend to solve the problem, and the legislation must not be unduly oppressive upon the person regulated. While I think I can fairly conclude there is an apparent public problem or evil and that legislation tends to solve the problem, I cannot conclude that the legislation is not unduly oppressive upon the person or the owners which it targets. I think that the purpose espoused by counsel in defending the statute is laudible [sic] and certainly an appropriate purpose with which this society and this state must be concerned.

And it's not easy for me, in recognition of that purpose and the circumstances that face the low income or elderly, to look away from their cause, but I'm sworn to uphold constitutional principles. And in light of other alternatives to which the Legislature could have resorted to subsidize and to finance and remediate this concern or this social evil, that is,

limited housing for the elderly and low income, there could be a much broader revenue-producing scheme developed than placing the burden of remedying this social evil or the remedy of this social evil on the backs of the mobile home park owners.

While it is true some may go into the mobile home park business and then for other financial motives leave the business and attempt to convert their property to a higher or other use, it is my view that such is their right. And the exercise of that right is not what is creating the problem. There are a host of other problems which involve land use regulation that involve the ability of individuals to earn and maintain income.

But it just seems to me that implicit in the Plaintiffs' arguments is the reality that mobile home park owners fill a demand, there's a demand for affordable, low-cost housing. They don't have to get into that business, they can hold on to their property and put it to another use, but if they had in the past put it to the use of providing rental spaces for mobile homes which are much less expensive to the mobile home owner than having to acquire a building lot or some other kind of a lot other than a mobile home park pad, they provide a low-cost housing alternative to a mobile home owner.

Now, if after a period of time they determine to convert their property to another use, it is the responsibility of the owner who has provided that resource to the low income or elderly

person to now have to pay this kind of rental relocation assistance subsidy required by the statute notwithstanding that there are other causes in this society and this community that give rise to the low income housing problem? In my view the formula of the legislation is unduly oppressive on the mobile park owners. It shifts to them who, I believe, are providing as much a housing resource as they are making an inappropriate profit out of selfish greed or motivation.

I believe the State in this legislation, like the city ordinance in San Telmo, is attempting to shift public responsibility of providing low cost housing to a limited segment of the population and the attempt as such constitutes a tax, and the form of the tax, in view of other broad based alternatives, in my view, is unduly oppressive. For example, the State could tax all mobile home park owners at a large per pad, a certain dollar amount per month.

It could tax other activities in which low income and elderly or others for that matter are involved to subsidize this fund. But when it lays an assessment onto only those mobile home park owners who choose to redevelop their property and not other mobile home park owners. I consider that to be a classification which violates equal protection.

The fact that the converting mobile home park owner has to pay a portion of the subsidy or all of it depending upon the

status of the fund when the nonconverting mobile home park owner does not have to pay any assessment; and the fact that the assessment has to be paid without regard to whether or not the tenant is a low income tenant as opposed to someone that has the financial wherewithal to relocate, I believe, violates equal protection principles.

And while I would like to see the Legislature come up with a viable response to the issue of low income housing and housing for the elderly, it is my unhappy decision that the manner in which the Legislature has thus far addressed that problem in the challenged portions of Chapter 201 of the Laws of 1989 and Chapter 171, the Laws of 1990, the Mobile Home Relocation Assistance Acts of 1989 and 1990 is unconstitutional, and, accordingly, I will grant the Plaintiffs' motion for summary judgment and enter an order declaring the challenged provisions of those laws unconstitutional for the reasons that I have enumerated.

And I appreciate the efforts of both counsel in briefing, apprising the Court of the issues that are involved in this case. They have been well prepared on both sides.

MR. BLANKENSHIP: Thank you, Your Honor. We'll work out an order.

* * *

APPENDIX F

CHAPTER 171, LAWS OF 1990

MOBILE HOME RELOCATION ASSISTANCE

AN ACT Relating to mobile home relocation; amending RCW 59.21.010, 59.21.020, 59.21.030, 59.21.050, 59.21.060, 82.45.090, 82.08.065, 59.21.080, and 59.22.060; adding a new section to chapter 59.21 RCW; repealing RCW 59.21.090; and providing an effective date.

Be It Enacted By The Legislature Of The State Of Washington:

Sec. I. Section 1, chapter 201, Laws of 1989 and RCW 59.21.010 are each amended to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Director" means the director of the department of community development.

(2) "Department" means the department of community development.

(3) "Fund" means the mobile home park relocation fund established under RCW 59.21.050 consisting of tenant and

landlord contributions.

(4) "Low-income" means at or below eighty percent of median household income as defined by the United States department of housing and urban development, for the county or standard metropolitan statistical area where the park is located.

(5) "Mobile home park" or "park" means real property that is rented or held out for rent to others for the placement of two or more mobile homes for the primary purpose of production of income, except where the real property is rented or held out for rent for seasonal recreational purpose only and is not intended for year-round occupancy.

(6) "Landlord" or "park-owner" means the owner of the mobile home park that is being closed at the time relocation assistance is provided.

(7) "Relocate" means to remove the mobile home from the mobile home park being closed.

(8) "Relocation assistance" means the monetary assistance provided under RCW 59.21.020.

Sec. II. Section 2, chapter 201, Laws of 1989 and RCW

59.21.020 are each amended to read as follows:

(1) If a mobile home park is closed or converted to another use, all affected park tenants owning a mobile home are entitled to relocation assistance from the park-owner or the fund at the time the tenant relocates as follows: (a) For a single-wide mobile home, four thousand five hundred dollars; and (b) for a double-wide or larger mobile home, seven thousand five hundred dollars. No park tenant shall receive relocation assistance from the park owner or the fund for relocation of a recreational vehicle. The relocation assistance costs shall be adjusted annually by the housing component of the consumer price index for the Washington state area.

(2) When a tenant is forced to relocate before July 1, 1991, the payment of relocation assistance as provided by this section shall be paid by the park-owner. However, if the tenant has been given notice to vacate prior to April 1, 1989, and the tenant has not yet relocated as of April 28, 1989, the payment of relocation assistance by the park-owner shall be required only if the tenant is low income.

(3) When a tenant is forced to relocate after June 30,

1991, the payment of relocation assistance to low-income park tenants as provided in this section shall be shared as follows: The landlord or park-owner shall provide one-third and the fund shall provide two-thirds.

(4) After July 1, 1992, (a) if twenty-four months' notice of closure is given, the landlord or park-owner shall provide five hundred dollars for a single-wide home or one thousand dollars for a double-wide or larger home and the fund shall provide the balance of the relocation assistance to low-income park tenants; (b) if the park-owner gives less than twenty-four months' notice the park-owner shall provide one-third and the fund shall provide two-thirds of the relocation assistance to low-income park tenants.

(5) All tenants eligible for relocation assistance shall apply for verification of eligibility to the department. The department shall issue a document to each tenant signifying the tenant's low-income status, or status other than low income to be given to the park-owner by the tenant.

(6) The park-owner shall be responsible for paying up to the full amount of relocation assistance to low-income park

tenants if there are insufficient moneys in the fund. The department shall adopt rules governing disbursals of assistance from the fund and park-owner payments when there are insufficient moneys to meet the demand for relocation assistance.

(7) The park-owner shall pay park tenants who do not qualify as low-income tenants the same amount of relocation assistance that low-income park tenants are entitled to from the park-owners under this section. The landlord shall pay the relocation assistance directly to the tenant if the tenant submits to the landlord a copy of the contract entered into for the purpose of relocating the mobile home, which includes the date of relocation. The tenant may recover court costs and a reasonable attorney's fee in any action brought to require the landlord to pay relocation assistance under this subsection in which the tenant prevails.

(8) The park-owner shall make any payment to the department required by this chapter when demanded by the department; however, the department shall not demand such payment earlier than thirty days prior to the expected relocation date of the tenant. If the landlord does not pay his or her

portion of the relocation assistance to the department when required by this chapter, the department shall have a lien on the real property on which the park is located. Such lien shall be collected as delinquent general property taxes and shall be forwarded to the department by the county treasurer.

(((~~(6)~~))) (9) The director or his or her designee shall approve all expenditures from the fund.

(((~~(7)~~))) (10) Relocation assistance contributions required from landlords or park-owners by this section shall be reduced by the amount paid or required to be paid under any other law for the same mobile home park tenant for the same relocation.

(11) Notwithstanding RCW 59.21.100, it is a violation of this chapter to request or require as a condition of initiating or renewing a tenancy in a mobile home park, a waiver of relocation assistance under this section or any other law or ordinance. Any such waiver, regardless of the date of its execution, is void and unenforceable as contrary to public policy.

(12) Any park owner coercing or attempting to coerce a tenant into terminating a tenancy for the purpose of avoiding the payment of relocation assistance shall give rise to a civil cause

of action for damages or equitable relief by a tenant injured by such act.

Sec. III. Section 3, chapter 201, Laws of 1989 and RCW 59.21.030 are each amended to read as follows:

Notice required by RCW 59.20.080 before park closure or conversion of the park, whether twelve months or longer, shall be given to the director and all tenants in writing, and posted at all park entrances. Notice must also include the tenant's right to relocation assistance, if applicable. Notice must also be recorded in the office of the county auditor for the county where the mobile home park is located. This section shall apply to all park closures even though notice may have been given prior to April 28, 1989.

NEW SECTION. **Sec. IV.** A new section is added to chapter 59.21 RCW to read as follows:

The obligation of a park-owner to pay relocation assistance under this chapter runs with the land and is binding upon purchasers, successors and assigns of any park-owner obligated to provide relocation assistance under this chapter.

Sec. V. Section 5, chapter 201, Laws of 1989 and RCW 59.21.050 are each amended to read as follows:

(1) The mobile home park relocation fund is created in the custody of the state treasurer. All legislative appropriations for mobile home relocation assistance, receipts from ((~~assessments~~)) fees collected under ((~~RCW 59.21.060~~)) this chapter, and amounts required to be paid by park-owners to low-income park tenants shall be deposited into the fund. Expenditures from the fund may be used only for ((~~administration of the fund,~~)) relocation assistance under RCW 59.21.020, or transfer to the mobile home park purchase fund under subsection (2) of this section. Only the director of community development or the director's designee may authorize expenditures from the fund. All relocation payments to low-income park tenants, including those due from the park-owner shall be made from the fund. The fund is subject to allotment procedures under chapter 43.88 RCW, but no appropriation is required for expenditures.

(2) The state treasurer shall maintain the fund and shall invest the fund moneys. Moneys earned on these investments

shall be deposited in the fund and shall be used for the same purposes as other fund moneys. Unexpended and unencumbered moneys that remain in the fund at the end of the fiscal year do not revert to the state general fund but remain in the fund, separately accounted for, as a contingency reserve, or if the director determines at the end of any fiscal year beginning after December 31, 1991, that the fund contains a surplus over the projected amount needed for relocation during the upcoming year(s), any surplus may be transferred to the mobile home park purchase fund created by chapter 59.22 RCW. However, the director may cause any uncommitted funds in the mobile home park purchase fund which were transferred from the mobile home park relocation fund to be transferred back to the mobile home park relocation fund if that fund cannot otherwise meet its current obligations.

(3) A low-income park tenant who is entitled to relocation assistance under this chapter is entitled to payment only after submitting an application which includes: (a) A copy of the notice from the park-owner that the tenancy is terminated due to closure of the park; (b) a copy of the rental agreement

currently in force; and (c) a copy of the contract entered into for the purpose of relocating the mobile home, which includes the date of relocation.

(4) The director may adopt rules for the administration of the fund.

~~(((5) The department may use money from the fund to offset the necessary costs of administering the fund. Administrative cost reimbursement shall not exceed fifty thousand dollars or five percent of the revenue to the fund for any given fiscal year, whichever is greater, to offset expenses incurred during that year.~~))

Sec. VI. Section 6, chapter 201, Laws of 1989 and RCW 59.21.060 are each amended to read as follows:

(1) There is hereby ((~~placed~~)) imposed a fee of sixty-five dollars on ((~~all~~)) every transfer of title on new or used mobile homes ((~~located in mobile home parks an annual assessment of eleven dollars per mobile home beginning on January 1, 1990. The assessment shall be collected by the county treasurer or treasurers within the county or counties where the mobile home or the mobile home park is located. Notice of the assessment~~

created under this section may be included on the notice of property taxes due, or may be sent separately from the notice of property taxes due. The assessment created under this section shall be due at the same time property taxes are due and shall constitute a lien on the mobile home upon which the assessment is imposed. Delinquent assessments created under this section shall be foreclosed in the same manner, and subject to the same time schedules, interest, and penalties as delinquent property taxes. County treasurers may impose a fee for collecting the assessment created in this section not to exceed five percent of the dollar value of the collection of assessments created under this section. The county treasurer may collect the assessment for 1990 at the same time the county treasurer collects the assessment for 1991 if the county treasurer would experience undue hardship in collecting the 1990 assessment in that year.

(2) Upon the request of the treasurer of the county or counties where the mobile home park is located, each park owner shall provide the county treasurer with a list of all tenants residing in the park on January 1, 1989. This list shall be mailed by August 1, 1989, to the treasurer or treasurers of the

~~county or counties where the mobile home park is located. The list shall include the name and address of each tenant, and the mobile home tax number of each tenant if available. Upon the request of the treasurer of the county or counties where the mobile home park is located, the park owners shall update the list of tenants residing in the park.~~

~~(3) The assessments collected under subsection (1) of this section shall be forwarded to the state treasurer, less any administration fee collected by the county treasurer under this section. The state treasurer shall deposit one dollar of the assessment collected per mobile home in the mobile home affairs account created by RCW 59.22.070; the remainder of the assessment forwarded to the state treasurer under this subsection shall be deposited in the mobile home park relocation fund created under RCW 59.21.050.~~

~~(4)~~)) where ownership of the mobile home is changed by any transaction including but not limited to sales and gift transactions and transfers of ownership which involve elimination of title under chapter 65.20. The county auditor or county treasurer shall collect the fee as provided in chapter 82.08 or

82.45 RCW. The fee collected under this section shall be forwarded to the state treasurer. The state treasurer shall deposit fifty dollars of each fee collected in the mobile home park relocation fund created under RCW 59.21.050 and the remaining fifteen dollars of each fee collected in the mobile home affairs account created by RCW 59.22.070.

(2) The department of revenue, the department of licensing, and the state treasurer((, ~~and the county treasurers~~)) may enact any rules necessary to carry out this section.

Sec. VII. Section 28A.45.090, chapter 223, Laws of 1969 ex. sess. as last amended by section 2, chapter 192, Laws of 1984 and RCW 82.45.090 are each amended to read as follows:

The tax imposed by this chapter and the fee imposed in RCW 59.21.060(1) shall be paid to and collected by the treasurer of the county within which is located the real property which was sold, said treasurer acting as agent for the state. The county treasurer shall cause a stamp evidencing satisfaction of the lien to be affixed to the instrument of sale or conveyance prior to its recording or to the real estate excise tax affidavit in the case of

used mobile home sales and used floating home sales. A receipt issued by the county treasurer for the payment of the tax imposed under this chapter shall be evidence of the satisfaction of the lien imposed hereunder and may be recorded in the manner prescribed for recording satisfactions of mortgages. No instrument of sale or conveyance evidencing a sale subject to the tax shall be accepted by the county auditor for filing or recording until the tax shall have been paid and the stamp affixed thereto; in case the tax is not due on the transfer, the instrument shall not be so accepted until suitable notation of such fact has been made on the instrument by the treasurer.

Sec. VIII. Section 1, chapter 89, Laws of 1987 and RCW 82.08.065 are each amended to read as follows:

In the collection of the sales tax on mobile homes and the fee imposed in RCW 59.21.060(1), the department of revenue may designate the county auditors of the several counties of the state as its collecting agents. Upon such designation, it shall be the duty of each county auditor to collect the tax and the fee at the time the mobile home dealer or selling agent applies for a new certificate of ownership for such mobile home in the

instance where transfer of ownership was from a mobile home dealer or person deemed a selling agent under RCW 82.04.480, except where the applicant presents a written statement signed by the department of revenue or its duly authorized agent showing that no retail sales tax or use tax is legally due. The term "mobile home" as used in this section means a mobile home as defined in RCW 46.04.302. It shall be the duty of every mobile home dealer or selling agent to declare upon the application for a new certificate of ownership the selling price paid for the mobile home. Any person willfully misrepresenting, or failing or refusing to declare upon the application, such selling price shall be guilty of a gross misdemeanor.

Each county auditor who acts as agent of the department of revenue shall at the time of remitting license fee receipts on motor vehicles subject to the provisions of RCW 82.12.045 pay over and account to the state treasurer for all sales tax revenue collected under this section, after first deducting as his or her collection fee the sum of two dollars for each mobile home upon which the tax has been collected.

Any applicant who has paid sales tax to a county auditor

under this section may apply to the department of revenue for refund thereof if he has reason to believe that such tax was not legally due and owing. No refund is allowed unless application therefor is received by the department of revenue within four years after payment of the tax. Upon receipt of an application for refund the department of revenue shall consider the same and issue its order either granting or denying it and if refund is denied the taxpayer shall have the right of appeal as provided in RCW 82.32.170, 82.32.180, and 82.32.190.

The provisions of this section shall be construed as cumulative of other methods prescribed in chapters 82.04 to 82.32 RCW, inclusive, for the collection of the tax imposed by this chapter. The department of revenue shall have power to adopt such rules as may be necessary to administer the provisions of this section. Any duties required by this section to be performed by the county auditor may be performed by the director of licensing but no collection fee shall be deductible by the director of licensing in remitting sales tax revenue to the state treasurer.

Sec. IX. Section 11, chapter 201, Laws of 1989 and RCW 59.21.080 are each amended to read as follows:

Before a mobile home park-owner may close a mobile home park or convert it to another use, the owner shall pay amounts owed for relocation assistance under RCW 59.21.020 to the ((~~state treasurer~~)) department for deposit into the fund. A park-owner may give notice as required by RCW 59.20.080 and this chapter before payment of these amounts.

Sec. X. Section 4, chapter 280, Laws of 1988 as amended by section 7, chapter 201, Laws of 1989 and RCW 59.22.060 are each amended to read as follows:

(1) Every landlord shall register by October 1, 1988, with the department of revenue under such rules as that department shall prescribe.

(2) Every landlord shall pay a fee of one dollar per lot per year, except for unoccupied lots, until December 31, 1990. This fee shall be remitted by the landlord to the department of revenue under such rules as the department shall prescribe. The department of revenue shall forward the one-dollar fee per lot paid by the landlord to the mobile home affairs account created

by RCW 59.22.070.

~~(((3) This section shall take effect on January 1, 1990.~~))

NEW SECTION. **Sec. XI.** Sections 6, 7, and 8 of this act shall take effect July 1, 1990.

NEW SECTION. **Sec. XII.** Section 13, chapter 201, Laws of 1989 and RCW 59.21.090 are each repealed.

Passed the House March 6, 1990.

Passed the Senate March 2, 1990.

Approved by the Governor March 26, 1990.

Filed in Office of Secretary of State March 26, 1990.

APPENDIX G

CHAPTER 201, LAWS OF 1989

MOBILE HOME RELOCATION ASSISTANCE

AN ACT Relating to mobile home relocation assistance; amending RCW 59.22.060, 59.22.070, 59.20.060, and 59.20.080; adding a new chapter to Title 59 RCW; prescribing penalties; and declaring an emergency.

Be It Enacted By The Legislature Of The State Of Washington:

NEW SECTION. Sec. I. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Director" means the director of the department of community development.

(2) "Department" means the department of community development.

(3) "Fund" means the mobile home park relocation fund established under section 5 of this act consisting of tenant and landlord contributions.

(4) "Low-income" means at or below eighty percent of

median income as defined by the United States department of housing and urban development, for the county or standard metropolitan statistical area where the park is located.

(5) "Mobile home park" or "park" means real property that is rented or held out for rent to others for the placement of two or more mobile homes for the primary purpose of production of income, except where the real property is rented or held out for rent for seasonal recreational purpose only and is not intended for year-round occupancy.

(6) "Landlord" or "park-owner" means the owner of the mobile home park that is being closed at the time relocation assistance is provided.

(7) "Relocate" means to remove the mobile home from the mobile home park being closed.

(8) "Relocation assistance" means the monetary assistance provided under section 2 of this act.

NEW SECTION. **Sec. II.** (1) If a mobile home park is closed or converted to another use, all affected park tenants are entitled to relocation assistance from the park-owner or the fund

at the time the tenant relocates as follows: (a) For a single-wide mobile home, four thousand five hundred dollars; and (b) for a double-wide or larger mobile home, seven thousand five hundred dollars.

(2) When a tenant is forced to relocate before July 1, 1991, the payment of relocation assistance as provided by this section shall be paid by the park-owner. However, if the tenant has been given notice to vacate prior to April 1, 1989, and the tenant has not yet relocated as of the effective date of this act, the payment of relocation assistance by the park-owner shall be required only if the tenant is low income.

(3) When a tenant is forced to relocate after June 30, 1991, the payment of relocation assistance as provided in this section shall be shared as follows: The landlord or park-owner shall provide one-third and the fund shall provide two-thirds.

(4) After July 1, 1992, (a) if twenty-four months' notice of closure is given, the landlord or park-owner shall provide five hundred dollars for a single-wide home or one thousand dollars for a double-wide or larger home and the fund shall provide the balance of the relocation assistance; (b) if the park-owner gives

less than twenty-four months' notice the park-owner shall provide one-third and the fund shall provide two-thirds of the relocation assistance.

(5) The parkowner shall make any payment required by this chapter when demanded by the department; however, the department shall not demand such payment earlier than thirty days prior to the expected relocation date of the tenant. If the landlord does not pay his or her portion of the relocation assistance to the department when required by this chapter, the department shall have a lien on the real property on which the park is located. Such lien shall be collected as delinquent general property taxes and shall be forwarded to the department by the county treasurer.

(6) The director or his or her designee shall approve all expenditures from the fund.

(7) Relocation assistance contributions required from landlords or park-owners by this section shall be reduced by the amount paid or required to be paid under any other law for the same mobile home park tenant for the same relocation.

NEW SECTION. **Sec. III.** Notice required by RCW 59.20.080 before park closure or conversion of the park, whether twelve months or longer, shall be given to the director and all tenants in writing, and posted at all park entrances. Notice must also include the tenant's right to relocation assistance, if applicable. This section shall apply to all park closures even though notice may have been given prior to the effective date of this act.

NEW SECTION. **Sec. IV.** A tenant is not entitled to relocation assistance under section 2 of this act if (1) the tenant has given notice to the landlord of his or her intent to vacate the park and terminate the tenancy before any notice of termination required by the landlord under this chapter has been given, or (2) a person purchases a mobile home already situated in the park or moves a mobile home into the park after a closure or change of use notice has been given and the person has received actual prior notice of the change or closure.

NEW SECTION. **Sec. V.** (1) The mobile home

park relocation fund is created in the custody of the state treasurer. All legislative appropriations for mobile home relocation assistance, receipts from assessments collected under section 6 of this act, and amounts required to be paid by park-owners shall be deposited into the fund. Expenditures from the fund may be used only for administration of the fund, relocation assistance under section 2 of this act, or transfer to the mobile home park purchase fund under subsection (2) of this section. Only the director of community development or the director's designee may authorize expenditures from the fund. All relocation payments, including those due from the park-owner shall be made from the fund. The fund is subject to allotment procedures under chapter 43.88 RCW, but no appropriation is required for expenditures.

(2) The state treasurer shall maintain the fund and shall invest the fund moneys. Moneys earned on these investments shall be deposited in the fund and shall be used for the same purposes as other fund moneys. Unexpended and unencumbered moneys that remain in the fund at the end of the fiscal year do not revert to the state general fund but remain in the fund,

separately accounted for, as a contingency reserve, or if the director determines at the end of any fiscal year beginning after December 31, 1991, that the fund contains a surplus over the projected amount needed for relocation during the upcoming year(s), any surplus may be transferred to the mobile home park purchase fund created by chapter 59.22 RCW. However, the director may cause any uncommitted funds in the mobile home park purchase fund which were transferred from the mobile home park relocation fund to be transferred back to the mobile home park relocation fund if that fund cannot otherwise meet its current obligations.

(3) A tenant who is entitled to relocation assistance under this chapter is entitled to payment only after submitting an application which includes: (a) A copy of the notice from the parkowner that the tenancy is terminated due to closure of the park; (b) a copy of the rental agreement currently in force; and (c) a copy of the contract entered into for the purpose of relocating the mobile home, which includes the date of relocation.

(4) The director may adopt rules for the administration

of the fund.

(5) The department may use money from the fund to offset the necessary costs of administering the fund. Administrative cost reimbursement shall not exceed fifty thousand dollars or five percent of the revenue to the fund for any given fiscal year, whichever is greater, to offset expenses incurred during that year.

NEW SECTION. Sec. VI. (1) There is hereby placed on all mobile homes located in mobile home parks an annual assessment of eleven dollars per mobile home beginning on January 1, 1990. The assessment shall be collected by the county treasurer or treasurers within the county or counties where the mobile home or the mobile home park is located. Notice of the assessment created under this section may be included on the notice of property taxes due, or may be sent separately from the notice of property taxes due. The assessment created under this section shall be due at the same time property taxes are due and shall constitute a lien on the mobile home upon which the assessment is imposed. Delinquent assessments

created under this section shall be foreclosed in the same manner, and subject to the same time schedules, interest, and penalties as delinquent property taxes. County treasurers may impose a fee for collecting the assessment created in this section not to exceed five percent of the dollar value of the collection of assessments created under this section. The county treasurer may collect the assessment for 1990 at the same time the county treasurer collects the assessment for 1991 if the county treasurer would experience undue hardship in collecting the 1990 assessment in that year.

(2) Upon the request of the treasurer of the county or counties where the mobile home park is located, each park-owner shall provide the county treasurer with a list of all tenants residing in the park on January 1, 1989. This list shall be mailed by August 1, 1989, to the treasurer or treasurers of the county or counties where the mobile home park is located. The list shall include the name and address of each tenant, and the mobile home tax number of each tenant if available. Upon the request of the treasurer of the county or counties where the mobile home park is located, the park-owners shall update the

list of tenants residing in the park.

(3) The assessments collected under subsection (1) of this section shall be forwarded to the state treasurer, less any administration fee collected by the county treasurer under this section. The state treasurer shall deposit one dollar of the assessment collected per mobile home in the mobile home affairs account created by RCW 59.22.070; the remainder of the assessment forwarded to the state treasurer under this subsection shall be deposited in the mobile home park relocation fund created under section 5 of this act.

(4) The department of revenue, the state treasurer, and the county treasurers may enact any rules necessary to carry out this section.

Sec. VII. Section 4, chapter 280, Laws of 1988 and RCW 59.22.060 are each amended to read as follows:

(1) Every landlord shall register by October 1, 1988, with the department of revenue under such rules as that department shall prescribe.

(2) Every landlord shall pay a fee of one dollar per lot

per year, ((~~and in addition, shall collect from each tenant on January 1 of each year a fee of one dollar per year for each lot rented by the tenant. Both fees~~)) except for unoccupied lots. This fee shall be remitted by the landlord to the department of revenue under such rules as the department shall prescribe. ((~~The fee required by this chapter, to be collected by the landlord, shall be deemed to be held in trust by the landlord until paid to the department of revenue, and any landlord who appropriates or converts the fee collected to his or her own use other than the payment to the department shall be guilty of a gross misdemeanor. The provisions of chapter 82.32 RCW shall apply to the collection and enforcement of this fee.~~)) The department of revenue shall forward the one-dollar fee per lot paid by the landlord to the mobile home affairs account created by RCW 59.22.070.

(3) This section shall take effect on January 1, 1990.

Sec. VIII. Section 5, chapter 280, Laws of 1988 and RCW 59.22.070 are each amended to read as follows:

There is created in the custody of the state treasurer a

special account known as the mobile home affairs account. ((~~All fees collected pursuant to RCW 59.22.060 shall be placed in that account.~~))

Disbursements from this special account shall be as follows:

(1) For the two-year period beginning July 1, 1988, forty thousand dollars, or so much thereof as may be necessary for costs incurred in registering landlords and collecting fees, and thereafter five thousand dollars per year for that purpose.

(2) All remaining amounts shall be remitted to the department of community development for the purpose of implementing RCW 59.22.050 and 59.22.060.

Sec. IX. Section 6, chapter 279, Laws of 1977 ex. sess. as last amended by section 1, chapter 58, Laws of 1984 and RCW 59.20.060 are each amended to read as follows:

(1) Any mobile home space tenancy regardless of the term, shall be based upon a written rental agreement, signed by the parties, which shall contain:

(a) The terms for the payment of rent, including time and

place, and any additional charges to be paid by the tenant. Additional charges that occur less frequently than monthly shall be itemized in a billing to the tenant;

(b) Reasonable rules for guest parking which shall be clearly stated;

(c) The rules and regulations of the park;

(d) The name and address of the person who is the landlord, and if such person does not reside in the state there shall also be designated by name and address a person who resides in the county where the mobile home park is located who is authorized to act as agent for the purposes of service of notices and process. If no designation is made of a person to act as agent, then the person to whom rental payments are to be made shall be considered the agent;

(e) (i) A covenant by the landlord that, except for acts or events beyond the control of the landlord, the mobile home park will not be converted to a land use that will prevent the space that is the subject of the lease from continuing to be used for its intended use for a period of three years after the beginning of the term of the rental agreement;

(ii) A rental agreement may, in the alternative, contain a statement that the park may be sold or otherwise transferred at any time with the result that subsequent owners may close the mobile home park, or that the landlord may close the park at any time after the required notice. The covenant or statement required by this subsection must appear in print that is larger than the other text of the lease and must be set off by means of a box, blank space, or comparable visual device;

The requirements of this subsection shall apply to tenancies initiated after the effective date of this act.

(f) The terms and conditions under which any deposit or portion thereof may be withheld by the landlord upon termination of the rental agreement if any moneys are paid to the landlord by the tenant as a deposit or as security for performance of the tenant's obligations in a rental agreement;

(((~~f~~))) (g) A listing of the utilities, services, and facilities which will be available to the tenant during the tenancy and the nature of the fees, if any, to be charged;

(((~~g~~))) (h) A description of the boundaries of a mobile home space sufficient to inform the tenant of the exact location

of his space in relation to other tenants' spaces; and

((~~(h)~~)) (i) A statement of the current zoning of the land on which the mobile home park is located.

(2) Any rental agreement executed between the landlord and tenant shall not contain any provision:

(a) Which allows the landlord to charge a fee for guest parking unless a violation of the rules for guest parking occurs: PROVIDED, That a fee may be charged for guest parking which covers an extended period of time as defined in the rental agreement;

(b) Which authorizes the towing or impounding of a vehicle except upon notice to the owner thereof or the tenant whose guest is the owner of said vehicle;

(c) Which allows the landlord to alter the due date for rent payment or increase the rent: (i) During the term of the rental agreement if the term is less than one year, or (ii) more frequently than annually if the term is for one year or more: PROVIDED, That a rental agreement may include an escalation clause for a pro rata share of any increase in the mobile home park's real property taxes or utility assessments or charges, over

the base taxes or utility assessments or charges of the year in which the rental agreement took effect, if the clause also provides for a pro rata reduction in rent or other charges in the event of a reduction in real property taxes or utility assessments or charges, below the base year: PROVIDED FURTHER, That a rental agreement for a term exceeding one year may provide for annual increases in rent in specified amounts or by a formula specified in such agreement;

(d) By which the tenant agrees to waive or forego rights or remedies under this chapter;

(e) Allowing the landlord to charge an "entrance fee" or an "exit fee";

(f) Which allows the landlord to charge a fee for guests: PROVIDED, That a landlord may establish rules charging for guests who remain on the premises for more than fifteen days in any sixty-day period;

(g) By which the tenant agrees to waive or forego homestead rights provided by chapter 6.13 RCW. This subsection shall not prohibit such waiver after a default in rent so long as such waiver is in writing signed by the husband and

wife or by an unmarried claimant and in consideration of the landlord's agreement not to terminate the tenancy for a period of time specified in the waiver if the landlord would be otherwise entitled to terminate the tenancy under this chapter; or

(h) By which, at the time the rental agreement is entered into, the landlord and tenant agree to the selection of a particular arbitrator.

NEW SECTION. Sec. X. If the rental agreement includes a covenant by the landlord as described in RCW 59.20.060(1)(e)(i), the covenant runs with the land and is binding upon the purchasers, successors, and assigns of the landlord.

NEW SECTION. Sec. XI. Before a mobile home park-owner may close a mobile home park or convert it to another use, the owner shall pay amounts owed for relocation assistance under section 2 of this act to the state treasurer for deposit into the fund. A park-owner may give notice as required by RCW 59.20.080 and this chapter before payment of these

amounts.

Sec. XII. Section 8, chapter 279, Laws of 1977 ex. sess. as last amended by section 5, chapter 150, Laws of 1988 and RCW 59.20.080 are each amended to read as follows:

(1) Except as provided in subsection (2) of this section, the landlord shall not terminate a tenancy, of whatever duration except for one or more of the following reasons:

(a) Substantial violation, or repeated or periodic violations of the rules of the mobile home park as established by the landlord at the inception of the tenancy or as assumed subsequently with the consent of the tenant or for violation of the tenant's duties as provided in RCW 59.20.140. The tenant shall be given written notice to cease the rule violation immediately. The notice shall state that failure to cease the violation of the rule or any subsequent violation of that or any other rule shall result in termination of the tenancy, and that the tenant shall vacate the premises within fifteen days: PROVIDED, That for a periodic violation the notice shall also specify that repetition of the same violation shall result in termination: PROVIDED

FURTHER, That in the case of a violation of a "material change" in park rules with respect to pets, tenants with minor children living with them, or recreational facilities, the tenant shall be given written notice under this chapter of a six month period in which to comply or vacate;

(b) Nonpayment of rent or other charges specified in the rental agreement, upon five days written notice to pay rent and/or other charges or to vacate;

(c) Conviction of the tenant of a crime, commission of which threatens the health, safety, or welfare of the other mobile home park tenants. The tenant shall be given written notice of a fifteen day period in which to vacate;

(d) Failure of the tenant to comply with local ordinances and state laws and regulations relating to mobile homes or mobile home living within a reasonable time after the tenant's receipt of notice of such noncompliance from the appropriate governmental agency;

(e) Change of land use of the mobile home park including, but not limited to, conversion to a use other than for mobile homes or conversion of the mobile home park to a

mobile home park cooperative or mobile home park subdivision: PROVIDED, That the landlord shall give the tenants twelve months' notice in advance of the ((~~proposed~~)) effective date of such change, except that for the period of six months following the effective date of this act the landlord shall give the tenants eighteen months' notice in advance of the proposed effective date of such change;

(f) Engaging in "drug-related activity." "Drug-related activity" means that activity which constitutes a violation of chapter 69.41, 69.50, or 69.52 RCW.

(2) A landlord may terminate any tenancy without cause. Such termination shall be effective twelve months from the date the landlord serves notice of termination upon the tenant or at the end of the current tenancy, whichever is later: PROVIDED, That a landlord shall not terminate a tenancy for any reason or basis which is prohibited under RCW 59.20.070 (3) or (4) or is intended to circumvent the provisions of (1)(e) of this section.

(3) Within five days of a notice of eviction as required by subsection (1)(a) or (2) of this section, the landlord and tenant shall submit any dispute, including the decision to terminate the

tenancy without cause, to mediation. The parties may agree in writing to mediation by an independent third party or through industry mediation procedures. If the parties cannot agree, then mediation shall be through industry mediation procedures. A duty is imposed upon both parties to participate in the mediation process in good faith for a period of ten days for an eviction under subsection (1)(a) of this section, or for a period of thirty days for an eviction under subsection (2) of this section. It is a defense to an eviction under subsection (1)(a) or (2) of this section that a landlord did not participate in the mediation process in good faith.

NEW SECTION. Sec. XIII. Any unit of local government may, with the director's approval, give or loan moneys to the fund if insufficient moneys are available to pay the fund's share of relocation assistance under section 2 of this act. When sufficient moneys exist in the fund, the director shall approve the repayment of the loaned moneys to the local government.

NEW SECTION. **Sec. XIV.** A tenant may, with the written approval of his or her attorney at law, waive or compromise their right to relocation assistance under this chapter.

NEW SECTION. **Sec. XV.** Any person who intentionally violates, intentionally attempts to evade, or intentionally evades the provisions of this act is guilty of a misdemeanor.

NEW SECTION. **Sec. XVI.** Sections 1 through 6, 10, 11, 13, 14, and 15 of this act constitute a new chapter in Title 59 RCW.

NEW SECTION. **Sec. XVII.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. XVIII.** This act is necessary for

the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House April 19, 1989.

Passed the Senate April 13, 1989.

Approved by the Governor April 28, 1989.

Filed in the Office of Secretary of State April 28, 1989.

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No. 93-927

In The

Supreme Court of the United States

October Term, 1993

THE DIRECTOR OF THE DEPARTMENT OF COMMUNITY DEVELOPMENT,

Petitioner,

v.

ROBERT PATRICK GUIMONT, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF FACTS..... 1

ARGUMENT 2

1. The decision in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993), is consistent with decisions of the United States Supreme Court on the due process issue..... 3

2. The rule of *Lawton v. Steele* should remain intact.. 3

3. The national public policy of government fairness and justice requires preservation of the constitutional prohibition against government acts which are "unduly oppressive" on a few 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Armstrong v. United States, 364 U.S. 40, 41 L.Ed. 2d 1554, 80 S.Ct. 1563 (1960).....5, 9

Daniels v. Williams, 474 U.S., 88 L.Ed.2d 662, 106 S.Ct. 662 (1986).....7

Davis v. Mills, 194 U.S. 451, 457, 48 L.Ed. 1067, 24 S.Ct. 92 (1904).....9

Ferguson v. Skrupa, 372 U.S. 726, 10 L.Ed. 2d 93, 83 S.Ct. 1028 (1963).....3, 4

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 96 L.Ed. 2d 250, 107 S.Ct. 2378 (1987).....9

General Motors v. Romein, 112 S.Ct. 1105 (1992).....4, 5

Giaccio v. Pennsylvania, 382 U.S. 399, 15 L.Ed. 2d 447, 86 S.Ct. 518 (1966).....7

Goldblatt v. Town of Hempstead, 369 U.S. 590, 8 L.Ed. 2d 130, 82 S.Ct. 987 (1862).....3

Guimont v. Clarke, 121 Wn.2d 586, 584 P.2d 1 (1993)..3, 10

International Shoe Co. v. Washington, 326 U.S. 310, 91 L.Ed. 95, 66 S.Ct. 154 (1945).....7

Lawton v. Steele, 152 U.S. 133, 137, 38 L.Ed. 385, 14 S.Ct. 499 (1894).....3, 4

Lynch v. Household Fin. Corp., 405 U.S. 538, 31 L.Ed. 2d 424, 92 S.Ct. 1113 (1972).....8

Nollan v. California Coastal Commission, 483 U.S. 825, 97 L.Ed. 2d 677, 107 S.Ct. 8141 (1987).....3, 9

Ochoa v. Hernandez y Morales, 230 U.S. 139, 57 L.Ed. 1427, 33 S.Ct. 1033 (1913).....8

TABLE OF AUTHORITIES – Continued

Page

Pennell v. San Jose, 485 U.S. 1, 99 L.Ed. 2d 1, 108 S.Ct. 849 (1988) 9

Presbytery of Seattle v. King County, 114 Wn.2d 320, 787 P.2d 090 (1990), *cert. denied* 498 U.S. 911 (1990) 2

Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 94 L.Ed. 381, 70 S.Ct. 403 (1950) 7

United States v. Carolene Products Co., 304 U.S. 144, 82 L.Ed. 1234, 58 S.Ct. 778 (1937) 3, 4

Webb's Fabulous Pharmacies, Inc. v. Beckwick, 449 U.S. 155, 66 L.Ed. 2d 358, 101 S.Ct. 446 (1980) 9

COUNTERSTATEMENT OF FACTS

As invited by Rule 15.1, the following are perceived misstatements of fact in the State's petition which have a significant bearing on the issues presented.

(1) The statements on page 4 of the petition that "tenants lose both their housing and their investment when forced to relocate" and that tenants are at "a distinct economic disadvantage when a park owner decides to close a park" are the argumentative conclusions of the State's attorneys and are not legislative findings because the Acts in question contain no statement of purpose or legislative findings.

(2) On page 5 of its petition, the State correctly summarizes the requirements of the Acts and notes that section 2, subsection 6, of the 1990 Act requires the park owner to pay the full amount of assistance to low income tenants if there are insufficient monies in the state fund. The State omits the fact that the legislature never appropriated money to the fund and as a result it was broke when the intervenor, Bear Creek Associates, closed its park and was required to pay tenants the full amount of relocation assistance in the sum of $108,000.

(3) The State refers to a fee imposed by the 1990 Act on transfers of titles of mobile homes, $50 of which went to the state fund. The State then says: "Through the title transfer fee, the burden of relocation assistance was spread over the entire industry, not just onto park owners." (page 5 of petition) That statement is patently untrue because the state Acts expressly require payments by park owners independent of the fund, and Bear Creek

Associates singly bore the burden of relocation assistance on closure of its park without help from the industry.

(4) It is significant, but not mentioned by the State, that the 1990 Act required that "the park-owner shall pay park tenants who do not qualify as low-income tenants the same amount of relocation assistance that low income park tenants are entitled to from the park-owners under this section." Section II, subsection (7), of the Act set forth in Appendix F-5 of petition. Thus, as the price of going out of business, a park owner may be required to pay relocation assistance to some tenants who are in better financial shape than he is.

(5) The State cites *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 909 (1990), *cert. denied* 498 U.S. 911 (1990), as an example of how "the Washington State Supreme Court has used the vague contours of the due process clause to invalidate economic regulations more times in the past three years than the United States Supreme Court has in the past 55 years." (Footnote 6 on page 11 of petition.) *Presbytery* is a poor example because the regulation in that case was upheld by the court.

ARGUMENT

The State's petition raises questions only as to the State Supreme Court's decision based on due process. It does not deal with the Washington State Supreme Court formulation of its own unique rule on the takings issue, challenged in respondent's cross petition as inconsistent with decisions of this court.

1. *The decision in Guimont v. Clarke,* 121 Wn.2d 586, 854 P.2d 1 (1993), *is consistent with decisions of the United States Supreme Court on the due process issue.* The State's petition does not meet the criteria for review by the United States Supreme Court set forth in Rule 10 because the decision of the Washington State Supreme Court on the issue of due process is consistent with decisions of this court. See footnote 10 to the court's opinion set forth in Appendix A-31 of the petition, citing *Lawton v. Steele,* 152 U.S. 133, 137, 38 L.Ed. 385, 14 S.Ct. 499 (1894), and *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 8 L.Ed. 2d 130, 82 S.Ct. 987 (1862), which require the means of accomplishing a legislative objective to be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

That rule has never been overruled by this court. To the contrary, in 1962 in *Goldblatt v. Town of Hempstead* this court said the "Classic statement of the rule in *Lawton v. Steele* [citation omitted] is still valid today." In 1987 Justice Brennan in *Nollan v. California Coastal Commission,* repeated the statement that the rule in *Lawton v. Steele* "is still valid today." 483 U.S. 843, footnote 1. Since the state court decision is consistent with decisions of this court on the due process issue, there is no basis for review by this court.

2. *The rule of Lawton v. Steele should remain intact.* The State now asks this court to eliminate the rule set forth in *Lawton v. Steele,* arguing that statements in such cases as *United States v. Carolene Products Co.,* 304 U.S. 144, 82 L.Ed. 1234, 58 S.Ct. 778 (1937), *Ferguson v. Skrupa,* 372 U.S. 726, 10 L.Ed. 2d 93, 83 S.Ct. 1028 (1963), and

General Motors v. Romein, 112 S.Ct. 1105 (1992), render the rule of *Lawton v. Steele* out of date.

The State contends that the courts will not review "economic regulations" but defer to the legislature. Close examination of the cited cases discloses that they do not support the broad conclusions which the State draws from them. For example, in *Carolene Products* the court upheld a regulation prohibiting interstate shipment of adulterated milk products. The decision was not based solely on a presumption of constitutionality of the statute. The court said: "Affirmative evidence also sustains the statute" and the court described that evidence as showing that "the use of filled milk as a substitute for pure milk is generally injurious to health and facilities fraud on the public." 304 U.S. 148 and 149. *Ferguson v. Skrupa* upheld a Kansas statute which restricted "debt adjusting" to lawyers. In discussing an equal protection argument the court did not rely solely on a conclusive presumption of the propriety of legislative acts but listed factual reasons why a non-lawyer cannot perform the service to the same standards which a lawyer can. In *General Motors v. Romein* the court said that due process requires economic legislation to have a legitimate legislative purpose furthered by rational means. In footnote 7 on page 13 of its petition, the State quotes a portion of the court's statement but omits the following, which is particularly relevant to this case:

> Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation because it can deprive citizens of legitimate expectations and upset settled transactions.

112 S.Ct., at 112. That statement is relevant to this case because the Relocation Assistance Act imposed on park owners retroactively a price for going out of business which did not exist when they went into business, a factor the Washington State Supreme Court mentioned in its opinion. See Appendix A-35 and A-36 in petition. It is significant in that case that the court does review "economic legislation" to see that the *means* selected to accomplish a legislative *objective* are fair and reasonable. This court has said that fairness and justice bar government from forcing some to bear a public burden which should be shared by all. *Armstrong v. U.S.*, 364 U.S. 40, 41 L.Ed. 2d 1554, 80 S.Ct. 1563 (1960).

The state Act in this case does not fit the category of "economic regulation" as used by the State in its petition. The Act recites no public evil which it purports to eliminate and contains nothing which "regulates" park owners' conduct. Instead, it purports to enact a public welfare program at the expense of a few. As a price of going out of the mobile home park business, park owners are required to pay tenants, including even those who are not in financial need.

The State repeatedly claims that the State Supreme Court improperly used a "worst case scenario" to invalidate the state Act. Although the court gave an example of a worst case, it immediately explained that under *any* circumstance the state Act by its express language imposes on park owners an unreasonable duty. That portion of the State Supreme Court's opinion might be characterized as a "best case scenario" because at the same time the State compelled park owners to pay the full

amount of relocation assistance "when there are insufficient monies to meet the demand for relocation assistance," it failed to appropriate any money to the "state fund." See Appendix F-5 of petition. Describing that "best case scenario," the court said:

> Even if the fund has sufficient resources to share the burden, the Act still requires park owners to pay large sums of money, the amount of which will vary depending on how much notice the park owner gives to the tenants. Moreover, the Act does not limit the payment of relocation assistance to those who have a low income. Although tenants who do not meet the Act's definition of "low income" are not entitled to payments from the fund, they are entitled to receive the same payments made directly by the park owners to low income tenants. Thus, park owners must directly pay relocation assistance even to those tenants who are not financially burdened.
>
> We also note the Act's provisions are permanent in nature.

See Appendix A-35 of petition. Under a "best case scenario" the state Act is unreasonable, unfair and unduly oppressive on park owners.

3. *The national public policy of government fairness and justice requires preservation of the constitutional prohibition against government acts which are "unduly oppressive" on a few.* The State seems to argue that the public policy of the United States now requires the Supreme Court to announce a rule that in challenges to state enactments under the due process clause the court will accept the propriety of economic legislation if the court can imagine

any state of facts which can sustain it without regard to the impact on an individual or a few as to whether it is unduly oppressive on him or them.

As expressed in both the takings and due process clauses, our national public policy requires government to treat every person with fairness and justice, and the courts cannot abdicate this constitutional duty to see that that public policy is carried out. That public policy is designed to prevent government from becoming tyranny. That public policy requiring all persons to be treated with fairness and justice has a great historical tradition traced from the Magna Charta in 1215.[1]

Supreme Court decisions dealing with *due process* have repeatedly described fairness and justice to be its essence. *International Shoe Co. v. Washington*, 326 U.S. 310, 91 L.Ed. 95, 66 S.Ct. 154 (1945); *Giacco v. Pennsylvania*, 382 U.S. 399, 15 L.Ed. 2d 447, 86 S.Ct. 518 (1966); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 94 L.Ed. 381, 70 S.Ct. 403 (1950), referring to " . . . those deeply rooted notions of justice which the Due Process Clause expresses." 338 U.S., at 617. In *Daniels v. Williams*, 474 U.S., 88 L.Ed. 2d 662, 106 S.Ct. 662 (1986), the Court repeated that "the touchstone of due process is protection of the individual against arbitrary action of the government" and that due process "serves to prevent governmental power from being used for purposes of

---

[1] "While this provision of the Amendment (Fourteenth) is new in the Constitution of the United States as a limitation on the power of the States, it is old as a principle of civilized government. It is found in Magna Charta . . . " *Munn v. Illinois*, 94 U.S., at 123.

oppression." In *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 57 L.Ed. 1427, 33 S.Ct. 1033 (1913), the court said:

> Without the guaranty of "due process," the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that chapter (Two Coke Inst., 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing. 230 U.S., at 161.

There is in the State's petition an innuendo in its reference to "economic legislation" that "property rights" are entitled to less protection than "individual rights." There is no such thing as "property rights," there are only "individual rights," a distinction explained by this court in *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 31 L.Ed. 2d 424, 92 S.Ct. 1113 (1972):

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the

> other. That rights in property are basic civil rights has long been recognized.

Justice Holmes described the reason: "Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight." *Davis v. Mills*, 194 U.S. 451, 457, 48 L.Ed. 1067, 24 S.Ct. 92 (1904).

The *takings* clause is based on the same principle of fairness and justice. Thus, it is said that the purpose of the takings clause is "to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 41 L.Ed. 2d 1554, 80 S.Ct. 1563 (1960); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 96 L.Ed. 2d 250, 107 S.Ct. 2378 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwick*, 449 U.S. 155, 66 L.Ed. 2d 358, 101 S.Ct. 446 (1980). The court has indicated that fairness and justice bar the government from singling out one or a few to remedy a public problem. *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed. 2d 677, 107 S.Ct. 8141 (1987). In a dissenting opinion in *Pennell v. San Jose*, 485 U.S. 1, 99 L.Ed. 2d 1, 108 S.Ct. 849 (1988), Justice Scalia explained that one or a few landlords do not create tenants' poverty any more than the rest of society does and that those landlords should therefore not be singled out to provide a welfare program for poor tenants. He warned that if a principle is established that one or a few can be singled out to provide remedies to public problems which they do not cause or benefit from, "there is no end to the social transformations that can be accomplished by so-called 'regulation' at great expense to the

democratic process" because that process can be achieved "off budget" invisibly and thus with relative immunity from normal democratic processes. 485 U.S. at 22.

The national public policy should be preserved protecting the few from government demands that they solve public problems which society in general has created. The Washington State Supreme Court in *Guimont v. Clarke* properly applied the federal cases which implement that public policy under the due process clauses.

CONCLUSION

The State's petition should be denied.

Respectfully submitted,

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